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IN THE

Supreme Court of the United States

CITY OF SAN ANTONIO and TEXAS TOWING CORPORATION,

Petitioners,

v.

BRENDA L. STUCKY, d/b/a Bill's Wrecker Service, and RICHARD VILLANEVA, d/b/a Creswell's 24 Hour Wrecker Service,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the contract for towing services between the City of San Antonio and Texas Towing and relevant ordinances and code provisions, if deemed subject to any preemptive effect of the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1), fall within the public safety exception under that Act and whether the public safety exception contained in (c)(2)(A) has been properly interpreted to exclude a State's right to delegate public safety authority to municipalities.

Whether the contract for towing services between the City of San Antonio and Texas Towing and relevant ordinances and code provisions are proprietary in nature and therefore not subject to preemption by the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1) under the theory set forth in *Building & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/ Rhode Island, Inc.*, 507 U.S. 218 (1993).

LIST OF PARTIES

1. City of San Antonio	Defendant/Counter-Plaintiff/Petitioner
2. Texas Towing Corporation	Intervenor/Counter-Plaintiff/Petitioner
3. Brenda L. Stucky, d/b/a Bill's Wrecker Service	Plaintiff/Counter-Defendant/Respondent
4. Richard Villaneva, d/b/a Creswell's 24 Hour Wrecker Service	Plaintiff/Counter-Defendant/Respondent

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Texas Towing Corporation, is wholly owned by Miller Industries Incorporated, which is publicly traded.

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Petitioners City of San Antonio and Texas Towing Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, dated July 30, 2001, is reported at 260 F.3d 424 (5th Cir. 2001). (App. A) The district court order granting in part the Petitioners' motions for summary judgment was filed April 4, 2000, and is reported at 2000 WL 33348252 (W.D. Tex., Apr. 4, 2000). (App. B) The district court judgment granting judgment in favor of the City of Antonio was filed on May 4, 2000. (App. C) The district court amended judgment granting judgment in favor of the Petitioners was filed on May 23, 2000. (App. D)

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered by the Fifth Circuit Court of Appeals on July 30, 2001. The opinion on denial of the petitions for rehearing, dated September 14, 2001, is reported at 266 F.3d 342 (5th Cir. 2001). (App. E) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Federal Aviation Administration Authorization Act of 1994 amended the Interstate Commerce Act, 49 U.S.C. § 11501(h). The Interstate Commerce Commission Termination Act, passed in 1995, recodified 49 U.S.C. § 11501(h) at 49 U.S.C. § 14501(c). Section 14501(c) reads:

(c) Motor carriers of property. —

(1) General rule. — Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered. — Paragraph (1) —

> **(A)** shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

Also relevant are San Antonio City Ordinance No. 31977 (now codified at § 19-391 in the SAN ANTONIO MUNICIPAL CODE), San Antonio City Ordinance No. 77716, San Antonio City Ordinance No. 82744, and San Antonio City Ordinance No. 87775. These provisions are included as part of the Appendix (App. F-J).

STATEMENT OF THE CASE

A. Statement of Facts

This case arises from the public property towing system formulated by the City of San Antonio. Prior to 1963, there existed no City limitation of public property, non-consensual towing in San Antonio. (R. 822-23) Most wrecker services vying for tow opportunities monitored police radio transmissions, only to race to the scene of an accident in the hopes of obtaining business from the individuals involved, a process some refer to as "wreck chasing."[1] (R. 822-23) Typically, more than one company would appear at the scene, leading to a dispute as to which company would provide the towing services needed. (R. 822-23, 1043) There was no guarantee that the wrecker who arrived would have with it the proper equipment to accomplish the tow. In addition, the race to the scene created public safety dangers, not only because of the wreckers' excessive speed, but also due to the congestion of roadways, which made it difficult or impossible for emergency medical personnel to timely respond and which created extra work for those police officers at the scene. (R. 822-23, 1043)

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1. *See Whitten v. Vehicle Removal Corp.*, 56 S.W.3d 293, 299 n.3 (Tex. App. – Dallas 2001, pet. filed); *New Orleans Towing Ass'n v. City of New Orleans*, 2000 WL 193071, *1 (E.D. La., Feb. 15, 2000) ("Wreck chasing is a practice by which tow truck operators race to the scene of an accident in order to offer unsolicited assistance to disabled vehicles. Tow truck operators often use police radios and monitor police radio frequencies in order to determine the location of these accidents"), *abrogated by Stucky*; *Andrada v. City of San Antonio*, 555 S.W.2d 488, 490 (Tex.Civ.App. – San Antonio 1977, *writ dism'd*) (recognizing competitive environment and attendant safety concerns).

On December 12, 1963, the San Antonio City Council enacted City Ordinance No. 31977, which placed full authority to direct the towing of vehicles involved in collisions on City streets in the Chief of Police or his authorized representative. (R. 423) This ordinance, extending the same authority to the City's Director of Parking, subsequently was codified as City Code § 19-391. (R. 14) After passage of this ordinance, towing services were requested on a rotation basis from contracted towing companies. (R. 830) The rotation system, however, caused numerous problems due to delays, the unavailability of wreckers, and improper equipment. (R. 824-25) In 1977, the City entered into an exclusive contract for the provision of towing services with City Towing Associates, Inc. (R. 823) This contract remained in effect, by extensions, until the late 1980's. At that point, other towing companies initiated suit in federal court alleging violations of the Sherman Antitrust Act. In response, the City amended its contract with City Towing to create a prime contractor/subcontractor rotation system. (R. 830)

In 1993, the City issued a request for bid proposals for a new prime contract, which would last for an initial one-year term followed by an automatic four-year renewal option upon satisfactory performance during the initial period. (R. 432-39, 442-43, 475) Four bids were submitted, one of which was a joint bid by four separate companies. City staff reviewed the bids for recommendation to the City Council, and, during a regular meeting, the Council voted to grant the contract to Texas Towing Company through City Ordinance 77716. (R. 19)

In 1995, Texas Towing requested an amendment to its towing services contract, which would grant the City an

option to extend the contract for an additional five-year period, to allow Texas Towing to obtain additional financing and to justify an additional investment in equipment. (R. 887; X 43F) The Council amended the contract accordingly, and, on May 7, 1998, voted to exercise the option through Ordinance 87775. (R. 889; X 43F, G, and H) During this time, Congress enacted the Federal Aviation Administration Authorization Act and then the Interstate Commerce Commission Act for the purpose of deregulating the motor carrier industry.

B. Proceedings Below

On December 4, 1996, Brenda L. Stucky d/b/a Bill's Wrecker Service and Richard Villaneva d/b/a Creswell's 24 Hour Wrecker Service filed a complaint against the City of San Antonio. (R. 1-8) The complaint alleged that section 19-391 of the City Code, as well as Ordinance 77716 and any other laws, regulations, or ordinance concerning price, route, or service of a motor carrier, are preempted by the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1) and (2) ("FAAAA"). (R. 1-8) They also alleged a violation of their civil rights pursuant to 42 U.S.C. § 1983, claiming that the regulations deprived them of property and liberty interests, and alleged a violation of the Sherman Antitrust Act. (R. 1-8, 131-32, 188, 194) The complaint sought injunctive and monetary relief. (R. 1-8)

The City answered the complaint on January 28, 1997, and Texas Towing Corporation intervened shortly thereafter. (R. 62-67, 68-130, 133) Less than a year after filing their complaint, Stucky and Villaneva filed a motion for partial summary judgment, seeking a determination and declaration from the district court of the FAAAA's preemptive effect on the City's code provision and ordinance relating to towing.

(R. 245-357) The City and Texas Towing filed responses, and, on January 20, 1998, the district court issued an order granting the plaintiffs' motion for partial summary judgment and enjoining the City from further enforcement of those provisions. (R. 363-423, 434-97, 537-58) Upon various reconsideration requests, the district court ultimately withdrew its order and invited additional summary judgment filings. (R. 559-607, 608-15, 647, 744-53, 871-85, 760-81, 782-89) The parties followed with a new round of motions for summary judgment, and, on August 25, 1998, the district court issued an order granting in part and denying in part the various motions. (R. 796-807, 811-36, 886-903, 918-38)

In essence, the district court dismissed plaintiffs' section 1983 and antitrust claims with prejudice. The district court found that the City's contract system for towing was not preempted by 49 U.S.C. § 14501(c), but that City Ordinance 82744, amending the contract to provide an option to extend, and City Ordinance 87775, exercising that option, were preempted by the FAAAA. The district court further found that the extension of the contract, without open bid, went against Congress' intent to foster a free market. The district court issued a permanent injunction against the enforcement of these ordinances. A judgment was entered as to certain issues, upon joint motion by the parties, and the City and Texas Towing pursued an appeal to the United States Court of Appeals for the Fifth Circuit. (R. 981-91, 994, 996-97, 998, 1001-02) On December 14, 2000, the Fifth Circuit issued an opinion remanding the case to the district court on procedural grounds and instructing the district court to consider the Fifth Circuit's recent opinion in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999). (R 1014-17) (Copies of these prior decisions are submitted herewith as a Lodging.)

Upon remand, the parties reurged their respective motions for summary judgment to the district court. On April 3, 2000, the district court granted summary judgment in favor of the City and Texas Towing, finding that the City acted in a proprietary capacity in entering into its towing contract and foreclosing plaintiffs' claims that the City's single-vendor system was preempted by 49 U.S.C. § 14501. (R. 1114-20) The plaintiffs timely filed their notice of appeal on June 1, 2000. (R. 1134-35) The Fifth Circuit again reversed and remanded, holding that the City was not acting in a proprietary capacity in contracting with Texas Towing with respect to consent tows and holding that the safety exemption of section 14501 did not encompass action taken by municipalities. *Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001). The Fifth Circuit rejected application of the safety exemption to municipalities, even where the authority for city action had been delegated by a State, which is unquestionably covered by the Act's safety exemption. Petitions for panel and *en banc* rehearing were filed, which were denied by the Fifth Circuit with written opinion. *Stucky v. City of San Antonio*, 266 F.3d 342 (5th Cir. 2001). Petitioners, City of San Antonio and Texas Towing Corporation, have timely pursued this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

This Court is faced with competing state and federal interests, played out in competing state and federal court decisions, on an issue that affects every municipality across the country entrusted by their respective States with authority over towing services. Presented with what it described as a close question, the Fifth Circuit interpreted federal law to prohibit municipalities from contracting with a single vendor for the provision of what the Fifth Circuit defined as consent-

tow services. In so doing, it has denied the State of Texas the authority expressly granted to it by federal law, barring the State from delegating its regulatory duties to municipalities — duties that would otherwise escape federal preemption. It has also denied the City of San Antonio the ability to act in its proprietary function and secure the services necessary to accomplish its duties.

Other federal circuit and state courts have addressed similar questions regarding the preemptive effect of section 14501(c), and there is a pronounced difference of opinion. In fact, two of those decisions are currently pending before this Court: one addressing the municipality as proprietor exemption to preemption, *City of Columbus v. Our Garage & Wrecker Service*, 257 F.3d 506 (6th Cir. 2001), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Sept. 7, 2001) (No. 01-419), which has been redistributed for conference on January 4, 2002; and the other addressing the safety exemption of subsection (c)(2)(A) as applied to municipalities and in which this Court has requested a response and also redistributed for a conference on January 4, 2002, *People ex rel. Renne v. Servantes*, 86 Cal. App. 4th 1081, 103 Cal. Rptr. 2d 870 (2001), *petition for cert. filed*, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) (No. 01-336).

The Sixth, Ninth, and Eleventh Circuits, which the Fifth Circuit followed, have all held that the public safety exemption is not available to municipalities, even where those municipalities are exercising their safety authority by virtue of a delegation from the State — an entity expressly acknowledged by all to be covered by the safety exemption of section 14501(c). The Second Circuit, acknowledging the intrusion into State authority such an interpretation would bring, has held that the public safety exemption applies to

municipalities who derive their authority over towing operations from the State. Given the federal-state tension apparent in this question, it is all the more important that a state court, namely the Supreme Court of California, has held that the statute does not prohibit municipal action related to public safety in the context of towing. The Fifth Circuit's decision, made in the midst of this conflict, has effectively prohibited the City of San Antonio, and all other municipalities within its jurisdiction, from protecting citizens on public roads by discouraging the race of tow truck companies to the scene of an accident, a task delegated to the City of San Antonio by the State of Texas.

The lower federal courts also conflict, both with each other and with this Court's precedent, on whether the municipal proprietor exception applies to save ordinances such as the ones at issue here from the FAAAA's preemptive reach. For example, the Fifth Circuit in *Stucky* focused erroneously on whether the municipality supplants the consumer, *i.e.*, whether the tow is one in which the vehicle owner cannot consent, rather than whether the municipality is itself acting as a market participant, regardless of the owner's ability to request tow services and designate a specific provider. That tack is directly contrary to this Court's analysis in *Boston Harbor* and also conflicts with the circuit's earlier treatment of the issue in *Cardinal Towing*. And while other circuits have also focused on the consent/nonconsent dichotomy, they differ vastly in their definitions of "consent" and "nonconsent" tows, bringing the distinction into further question and revealing the Fifth Circuit's analytical flaw in relying exclusively on it. "Given the importance of the issue[s] and the conflict of authority," this Court should grant certiorari. *See Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991).

ARGUMENT

A. Preemption Should Not Be Found by Default

Anytime a court, particularly a federal one, determines whether a federal law supersedes and overrides state or local regulation on the subject pursuant to the Supremacy Clause of the United States Constitution, especially when the law addresses a subject traditionally within the police power of states or municipalities, that court must also consider the dual sovereignty put in place by that same Constitution.

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). "When pre-emption of state law is at issue, we must respect the 'principles [that] are fundamental to a system of federalism in which the state courts share responsibility for the application and enforcement of federal law.' " *Johnson v. Fankell*, 520 U.S. 911, 922 (1997). Given this tension between the Supremacy Clause, from which the preemption doctrine derives, and the federalist structure of the United States Constitution as a whole, courts have been reluctant to find federal preemption unless Congress' intent is unmistakable.

For example, both the Fifth Circuit, in an earlier decision addressing the preemptive effect of section 14501(c), and this Court have recognized that "when preemption is invoked to prevent a state or municipality from wielding its traditional police powers [such as setting the terms and conditions governing municipal contracts], congressional intent to displace that authority must be 'clear and manifest.' " *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Tex.*, 180 F.3d 686, 690 (5th Cir. 1999), *citing California v. ARC Am. Corp.*, 490 U.S. 93 (1989) and *Atkin v. State of Kansas*, 191 U.S. 207 (1903). The Fifth Circuit in this case, however, failed to give appropriate deference to local authority and held that federal law preempted municipal ordinances, though the court stated no less than twice that the question before it was close, characterized the legislative history as "ambiguous," and acknowledged precedent from this Court casting doubt on its interpretation of the "plain" statutory language. *Stucky*, 260 F.3d at 430, 440, 443, 444-45. Such a departure from traditional preemption analysis cannot stand, particularly when it is in stark contrast to the analysis conducted by other federal circuit, federal district, and state courts on the very federal provision at issue here.

B. The City of San Antonio's Single-Vendor Towing System Falls Within the Public Safety Exemption of Section 14501(c)(2)(A)

Section 14501(c)(2)(A) mandates that the FAAAA "*shall not* restrict the safety regulatory authority of a State with respect to motor vehicles." (emphais added) Public safety has long been considered a province of the state, creating a presumption against federal preemption in that field.

See Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996).[2] However, the federal circuit courts, as well as federal and state courts, have split on the issue of whether section 14501(c)(2)(A) applies to municipalities, even where those municipalities are acting pursuant to authority delegated to them by the State.

1. States Retain Authority to Regulate in the Area of Safety, Which Includes the Authority to Delegate Regulatory Duties to Municipalities

The Eleventh Circuit was the first to address the applicability of section 14501(c)(1) to municipal towing ordinances since the passage of the ICC Termination Act of 1996, and did so in *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 544 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999). In *Mayer*, several towing companies in the Atlanta area challenged the City of Atlanta's consensual towing system that governed towing within Atlanta's city limits. The Eleventh Circuit held that the ordinances were preempted and found that the Act's public safety exemption extended only to States, not their political subdivisions. The Sixth and Ninth Circuits followed and held similarly. *Petrey v. City of Toledo*, 246 F.3d 548, 560-61 (6th Cir. 2001); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1050-51 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001). The Fifth Circuit in *Stucky* joined this jurisprudential majority. *Stucky*, 260 F.3d at 446.

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2. For this reason, "municipal regulation of the business of towing is not unusual." *Interstate Towing Ass'n, Inc. v. City of Cincinnati*, 6 F.3d 1154, 1165 (6th Cir. 1993). There is ample support in the record, as recognized by the Fifth Circuit, that safety motivated the ordinances and code provision in question. (R. 375-77, 423, 476-77, 823(16-19), 824-25(30-36), 1040-44; X 43C-1)

The problem with these Circuits' reasoning is their requirement that safety authority be conferred *directly* upon municipalities by virtue of section 14501(c)(2)(A) in order for the safety exemption to apply to any municipal ordinance. *Petrey*, 246 F.3d at 561-62; *Tocher*, 219 F.3d at 1050 ("section 14501(c)(2)(A) only exempts safety regulations promulgated by state governments, not those enacted by municipalities"); *Mayer*, 158 F.3d at 545-46. The Second Circuit explained how this analysis misses the mark:

> [W]e see no reason to construe this language to prevent the state from delegating *its* regulatory authority to a municipality. To the contrary, the legislative history indicates that state safety regulatory authority (including, presumably, the authority to delegate) was to be 'unaffected' by the preemption statute.

Ace Auto Body & Towing, Ltd. v. City of New York, 171 F.3d 765, 775 (2d Cir.) (emphasis in original), *cert. denied*, 528 U.S. 868 (1999). In fact, this Court has recognized that States have traditionally re-delegated regulatory powers to municipalities. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-09 (1991), *cited in Harris County Wrecker Owners v. City of Houston*, 943 F. Supp. 711, 726-27 (S.D. Tex. 1996), *abrogated by Stucky*; *see also Martin v. Stites*, 2001 WL 121855, *10 (10th Cir., Feb. 13, 2001) (unpublished) (Briscoe, C.J., concurring and dissenting) (recognizing the conflict and the need for resolution), *cert. denied*, 122 S. Ct. 64 (2001).

Joining the Second Circuit is a California state court, which has held that the City of San Francisco's ordinances, enacted pursuant to authority delegated by the State of

California, escape preemption when they come within the FAAAA's safety exemption. *People ex rel. Renne v. Servantes*, 86 Cal. App. 4th 1081, 1092-94, 103 Cal. Rptr. 2d 870 (2001), *petition for cert. filed*, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) (No. 01-336). Though the *Servantes* court addressed only towing from private property, and not San Francisco's statutory scheme regulating the removal of vehicles from streets and highways by police officers, its holding rested on the preemptive reach of the Act. *Servantes*, 86 Cal. App. 4th at 1084 n.2, 1092-94. The *Servantes* court explained that the *Tocher* concern regarding the potentially expansive practice of state delegation to municipalities was "overstated." *Id.* at 1094 ("Had Congress intended not to except municipal safety regulations, Congress could have said so"). The *Servantes* court also followed the lead of *Ace Auto*, finding in the legislative history "no expression of a congressional desire to preempt local control over safety issues." *Id.*

Still other courts, before the Fifth Circuit's decision in *Stucky*, had concluded that use of the word "State" in the safety exemption "does not mean that this subsection of the status does not also allow municipal regulation." *Harris County Wrecker Owners v. City of Houston*, 943 F. Supp. 711, 726 (S.D. Tex. 1996), *abrogated by Stucky*, *citing Mortier*, 501 U.S. at 607-09, 611-12. The *Harris County* court recognized the ability of states to delegate authority to local government and noted that nothing in either the statute's text or its legislative history precluded such a reading. *Id.* at 726-27; *see also City of Charleston v. Government Employees Ins. Co.*, 869 F. Supp. 378, 386 (D.S.C. 1994) (holding that nothing in the history of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, 1012, which removed all Commerce Clause limitations on "a State" to regulate and tax the business of

insurance, or its overall structure, is inconsistent with allowing states to delegate taxing authority to municipalities), *opinion vacated*, May 18, 1995.

The *Harris County* court also noted that subsection (c)(2)(A) allows "a State to impose highway route controls or limitations based on . . . the hazardous nature of the cargo," which is a reference to the Hazardous Materials Transportation Authorization Act of 1994, 49 U.S.C. §§ 5101-5127. *Harris County*, 943 F. Supp. at 727. The HMTA Act makes clear that municipal authority over the routing of hazardous materials shipments by motor carriers is allowed, as long as it complies with the Act's standards. *Id.* As a result, because delegation is allowed in this instance, there is nothing to suggest that it is not allowed with respect to the safety exemption as well. *See also AJ's Wrecker Serv., Inc. v. City of Dallas*, 1998 WL 185521, *3 (N.D. Tex., Apr. 15, 1998) ("Section 14501(c)(2)(A) . . . preserves the City's authority to regulate motor vehicle safety"), *abrogated by Stucky*; *Hott v. City of San Jose*, 92 F. Supp. 2d 996 (N.D. Cal. 2000) (holding that federal law "does not preempt local regulations that concern safety when such regulations are authorized by state statute"), *aff'd*, 2001 WL 1458017 (9th Cir., Nov. 16, 2001) (unpublished); *New Orleans Towing Ass'n, Inc. v. City of New Orleans*, 2000 WL 193071, *9 (E.D. La., Feb. 15, 2000) ("although Congress did not expressly extend the protection of the safety exception to municipalities, this does not preclude a state from delegating its regulatory authority to the city"), *abrogated by Stucky*; *Northway Towing, Inc. v. City of Pasadena, Texas*, 94 F. Supp. 2d 801, 802 (S.D. Tex. 2000) (citing *Harris County*), *abrogated by Stucky*.[3]

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3. *See also Syldyld, Inc. v. City of San Jose*, 2001 WL 1459523 (9th Cir., Nov. 16, 2001) (unpublished) (following *Tocher*); *California* (Cont'd)

Absent any showing of intent on the part of Congress to override a State's interest in delegating this authority, a State must be allowed, per the statute's express terms, to legislate as it sees fit. *But see Tocher*, 219 F.3d at 1051 ("for section 14501(c)(2)(A) preemption purposes, a state may not delegate its regulatory authority to a municipality"). The State of Texas has expressed its intention to delegate its authority over tow truck operations to municipalities by stating that "a municipality may regulate the operation of a tow truck to the extent allowed by federal law." TEX. TRANSP. CODE § 643.201(a) (Vernon Supp. 2002). This delegation of authority by a State to municipalities to allow those municipalities to operate as arms of the State has been recognized by Texas' High Court. *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 805 (Tex. 1984); *Town of Ascarate v. Villalobos*, 148 Tex. 254, 223 S.W.2d 945, 950 (1949).

The Fifth Circuit's reading is also inconsistent with the Department of Transportation's interpretation of the provision. The Department has read subsection (c)(2)(A) as exempting both state and local safety regulations from

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(Cont'd)
Dump Truck Owners Ass'n v. Davis, 2001 WL 1504373, *5 (E.D. Calif., Oct. 30, 2001) ("the safety regulation exception . . . does not extend to California Code provisions which authorize local ordinances"); *Southern Blasting Servs., Inc. v. Wilkes County*, 162 F. Supp. 2d 455, 464-65 (W.D.N.C. 2001) (explaining that section (c)(2)(A) does not exempt political subdivisions of the state from the preemptory language of § 14501(c)(1)); *City of Cleveland v. Fox*, 2001 WL 792701, *3 (Ohio Ct. App., July 12, 2001) (unpublished) (following *Petrey*, but recognizing conflict); *City of Columbus v. Garrett*, 2001 WL 289980, **4-5 (Ohio Ct. App., March 27, 2001) (unpublished) (following *Mayer*, but recognizing conflict).

preemption. U.S. DEP'T OF TRANSP., INTRASTATE TRUCKING DEREGULATION; *see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (holding that in reviewing agency's construction of statute, when text of statute is ambiguous, court must not substitute its own interpretation for reasonable interpretation by agency charged with statute's administration); *Texas Savings & Cmty. Bankers Ass'n v. Federal Hous. Fin. Bd.*, 201 F.3d 551, 554 (5th Cir. 2000) (same).

2. Recognizing the Authority Congress Left to the States Neither Increases Nor Decreases the Potential for Municipal-Specific Safety Regulation

The majority of circuits have also rested their determination that the safety exemption does not apply to municipal ordinances on the theory that to rule otherwise would leave in place or allow for a tangled web of regulation and that to leave this authority to the States alone would prevent such a patchwork. *Stucky*, 260 F.3d at 431; *Petrey*, 246 F.3d at 563; *Tocher*, 219 F.3d at 1051; *Mayer*, 158 F.3d at 546. However, none of these decisions explains why this would not result from direct State regulation alone. There is nothing in section 14501(c) that prohibits States from enacting tow truck regulation on a city-by-city basis, and there has been no hint from the federal circuit courts that the State's regulatory approach somehow informs whether the safety exemption would be held to apply. In fact, the State of Texas has addressed the issue on an individual basis by delegating its tow truck oversight to the various municipalities within its borders. Moreover, the legislative history on which *Stucky* and other courts have relied indicates that the crux of Congress' concern was the effect of multiple regulations on interstate commerce by national and regional carriers, not

the effect of localized practices in the context of pure intra-municipal towing. H.R. CONF. REP. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759; *see also* H.R. CONF. REP. No. 104-311, at 82 (1995), *reprinted in* 1995 U.S.C.C.A.N. 797:

> [s]ince motor carrier transport is a truly *interstate* industry, it is critical to the smooth functioning of commerce that there be federal commercial rules established to ensure that all *interstate* transportation is subject to the same rules and procedures. Otherwise, a motor carrier would be potentially subject to 50 different rules for operation

(emphasis added).

As the Second Circuit in *Ace Auto* explained, the legislative history made clear that a state's safety regulatory authority, including the authority to delegate, was to be "unaffected" by the preemption statute. *Ace Auto*, 171 F.3d at 775, *quoting* H.R. CONF. REP. No. 103-677, at 84, 85, *reprinted in* 1994 U.S.C.C.A.N. at 1756, 1757. The *Ace Auto* court continued that while Congress had a deregulatory purpose in mind, the scope of that purpose is unclear and suggests that the key was to eliminate local economic regulation, not local safety regulation. *Ace Auto*, 171 F.3d at 775; *see also Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187 (9th Cir. 1998) (explaining FAAAA's purposes as across-the-board deregulation and leveling the playing field between air and motor carriers), *cert. denied*, 526 U.S. 1060 (1999). As a result, this Court should "hesitate to construe the text of § 14501 so as to frustrate unnecessarily the ability of

municipalities to respond to the local safety concerns created by local towing industries." *Ace Auto*, 171 F.3d at 775.

Such an approach makes sense. Practically, regulation of public safety concerns as they relate to towing from public streets and ways must be addressed by individual municipalities. The relevant considerations depend on factors unique to each municipality, such as population, city layout, and traffic patterns. The public safety concerns of a small city are, by necessity, different from those faced by the City of San Antonio, one of the most populated cities in the country. To expect the State of Texas to be able to create a public safety scheme to be applied across the board is unrealistic, as is the expectation that the State could create efficient safety regulations for each city individually. Absent evidence of express Congressional intent to preclude it, public policy dictates that municipalities be allowed to determine what safety concerns each faces and the best method for addressing them when that authority is conferred by the State.

3. *Mortier* Is Controlling, or At Least Informative, on the Extent to Which a State's Authority to Regulate Is Preserved

Finally, the courts conflict in their interpretation of this Court's decision in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991). In *Mortier*, this Court was concerned with the preemptive reach of FIFRA and whether it extended to local regulation of pesticide use. As the Fifth and other circuits have noted, the *Mortier* Court held that exclusion of political subdivisions from the ability to regulate could not be inferred from FIFRA's text, particularly where such regulatory authority was expressly conferred upon the States

and where political subdivisions are components of the very entity the statute empowers. *Id.* at 607-08. The majority of federal circuit courts addressing the FAAAA's preemptive reach have drawn a distinction between the *Mortier* decision, which addressed FIFRA, and the text of the FAAAA. The distinction rests on FIFRA's silence with respect to political subdivisions and the FAAAA's reference to political subdivisions several times in its text, though not in the context of the safety exemption. Faced with this wording, courts have held that the omission of a reference to political subdivisions from the safety exemption was no accident and that *Mortier* does not require that the phrase "political subdivisions" be read into the word "State" every time it is used in a statute. *Stucky*, 260 F.3d at 443; *Petrey*, 246 F.3d at 562; *Tocher*, 219 F.3d at 1051; *Mayer*, 158 F.3d at 547.

What those courts fail to realize about *Mortier* is that its reasoning went beyond merely reading the words "political subdivisions" into the word "State" for purposes of determining what entities were authorized to regulate pesticide use *directly*. Instead, the Court's holding rested on giving effect to the express preservation of a *State's* ability to regulate, when that ability might be exercised through delegation to a political subdivision such as a municipality — a holding that has been ignored by every circuit but the Second. *Ace*, 171 F.3d at 775-76, *quoting Mortier*, 501 U.S. at 608 ("the more plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities"); *see also Mortier*, 501 U.S. at 608 ("to read this provision as pre-empting localities would also require the anamolous result of pre-empting the actions of any agency to the extent it exercised *state-delegated*

powers that included pesticide regulation"), and at 609 ("While this statement indicates an unwillingness by Congress to grant political subdivisions regulatory authority, it does not demonstrate an intent to prevent the States from *delegating* such authority to its subdivisions, and still less does it show a desire to prohibit local regulation altogether") (emphasis added).

C. The City of San Antonio Has Acted in Its Proprietary Capacity in Opting for a Single-Vendor Towing System

When a municipality acts in its proprietary capacity, contracting for its own benefit, its actions are not subject to preemption by federal law. *Building & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/ Rhode Island, Inc.*, 507 U.S. 218, 226-27 (1993) ("*Boston Harbor*"). This Court has distinguished between the State acting as a market regulator and the State acting as a market participant, explaining that "where a State acts as a participant in the private market, it may prefer the goods or services of its own citizens, even though it could not do so while acting as a market regulator." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999). Several circuit courts have also addressed the applicability of the municipal proprietor exception to preemption under the FAAAA (the Fifth Circuit having done so twice), and, again, the results have varied.

1. The Fifth Circuit First Addressed the Issue and Has Done So Inconsistently

In *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999), the Fifth Circuit upheld a city's right to contract for the provision of towing

services, applying the analysis adopted by this Court in *Building & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island* ("*Boston Harbor*"), 507 U.S. 218 (1993). In *Boston Harbor*, this Court held that when a municipality acts as a participant in the market, in a narrow and focused manner akin to other market participants, the city is not acting as a regulator and its actions are not subject to preemption. *Boston Harbor*, 507 U.S. at 227-33. The *Cardinal Towing* court explained the two-part test for determining whether the city is acting as market participant or regulator: (1) whether the challenged action reflects the city's own interest in the "efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances"; and (2) whether the narrow scope defeats an inference that the "primary goal was to encourage a general policy rather than address a specific proprietary problem." *Cardinal Towing*, 180 F.3d at 693. It determined that in the context of "true nonconsent tows," the market participant exception applied and saved the City provisions from preemption. *Id.* at 693-94.

Here, the City of San Antonio has a proprietary interest in the efficient procurement of towing services on behalf of the City to maintain the public ways. (R. 375-77, 476-77, 1040-44) The City's actions in contracting for the provision of these services is akin to a private property owner's contracting with a towing company to provide a tow from his land. The contract at issue in this case, along with relevant ordinances and code provisions, extend only to City-authorized tows, *i.e.*, a narrowly-defined area limited to, for example, vehicles that have been abandoned or involved in a collision and not affecting towing from private property. This narrow scope does not create or encourage a general

policy that affects the towing industry at large. Instead, the system affects only those tows authorized by the City, which are only those tows from public ways in certain circumstances; and there exists no record support for the notions that the City's system affects a significant portion of the towing services market or that it is intended to implement a public regulatory plan, though the Fifth Circuit drew its own unsupported conclusions in that regard. *Stucky*, 260 F.3d at 439. Accordingly, the City's actions are proprietary, not regulatory, in nature, and not subject to preemption.

The Fifth Circuit's rejection of the Petitioners' position in *Stucky* rested solely on the distinction between consent and nonconsent tows, a distinction allegedly set forth in *Cardinal Towing*. *Stucky*, 260 F.3d at 437. However, the Bedford towing system addressed in *Cardinal Towing* actually affected "consent tows" as the *Stucky* panel defined that term. In *Stucky*, the court rejected the notion that all tows from the scene of accidents on public ways are properly characterized as nonconsensual. *Id.* at 434 n.11. However, the Bedford system defines a "nonconsent tow" as "any tow conducted without the permission of, or not at the direction of, the vehicle's legal or registered owner or such owner's authorized representative." BEDFORD, TEX., MUN. CODE § 126-156. Furthermore, regardless of the definition, "certified law enforcement officials may control the scene of an accident in the manner they deem appropriate," and tow companies are specifically prohibited from soliciting business at or near the scene of wrecks. *Id.* at §§ 126-156, 126-157. Thus, it is not at all clear that the consent/nonconsent dichotomy should be the measuring stick for determining the application of *Boston Harbor*, given that the distinction has been applied differently within the Fifth Circuit, as well as among the various circuit courts that have addressed it.

2. The Circuit Courts Have Distinguished Between Consensual Versus Nonconsensual Tows in Markedly Different Ways

All the circuit courts that have addressed application of the proprietary exception to preemption under the FAAAA have based their determination on whether the ordinance(s) in question relates to consensual or nonconsensual tows. *Petrey*, 246 F.3d at 558-59 (holding that challenged municipal towing provisions, which dealt solely with those towers wishing to perform non-consensual police tows for the City, were proprietary in nature and not preempted); *Tocher*, 219 F.3d at 1049 (holding that municipal code provision, which covered nonconsensual tows, escaped preemption by virtue of municipal-proprietor exception). However, the definitions used to delineate between the two types and where exactly that line is drawn varies from circuit to circuit.

In *Tocher*, for example, the court characterized as "nonconsensual tows" those that concern "abandoned, disabled, stored or impounded vehicles from public or private property," but went on to say that the City, pursuant to its ordinance and rotational tow list, wanted merely to create a "reliable list of towing companies who could render quick and efficient towing services for *the City*." *Tocher*, 219 F.3d at 1049 (emphasis added). The Ninth Circuit was quick to note that the City of Santa Ana's scheme "in no way affects the relationship between towing companies and the general public" because the code's scope covered "only contracts between the City and towing companies." *Id.*

In *Petrey*, the Sixth Circuit defined all police-ordered tows as nonconsensual. *Petrey*, 246 F.3d at 558. In addressing a municipal provision that related to consensual tows,

the *Petrey* court explained that it did not escape the preemptive effect of the Act because it applied to tow drivers "not doing work for the Toledo Police Department." *Id.* at 559. And in *Mayer*, although the Eleventh Circuit did not address the market participant doctrine, it did define consensual and nonconsensual tows differently from other circuits. Consensual tows were defined as those "which occur when the owner of a vehicle expressly requests towing services to be provided by a specific towing company and enters a private contract with the towing company for the services." *Mayer*, 158 F.3d at 541. Nonconsensual towing services were defined as occurring "when law enforcement or other local authorities determine that a vehicle must be towed and the owner of the vehicle is not afforded the opportunity to request towing services from a specific company. An example of a nonconsensual tow arises when an abandoned car is impounded by police." *Id.* at 541 n.2.

Thus, the *Mayer* and *Petrey* courts used definitions like those of the City, and much less restrictive than those used by the Fifth Circuit in *Stucky*. In fact, the Fifth Circuit's definition of nonconsensual tows was much more expansive in the *Cardinal Towing* decision, which held all ordinances relating to nonconsensual tows fall within the City's proprietary function and outside of any preemptive effect of the FAAAA. Finally, the statute has its own definition. In discussing the regulation of prices for non-consent tows, the statute expressly characterizes them as those "performed without the prior consent or authorization of the owner or operator of the motor vehicle" — again a much broader definition than employed by the *Stucky* court. 49 U.S.C. § 14501(c)(2)(C).

3. The Only Relevant Question Under *Boston Harbor* Is Whether the City Is Acting as a Market Participant

Not only is it unclear where the line should be drawn between consent and nonconsent tows, but the question remains whether this should be the measuring stick at all. The *Cardinal Towing* court used this delineation because it fit nicely into its "consumer" model, *i.e.*, whether the proprietary exception applied depended upon whether the City was the "consumer" of the towing services. Only if there were no other consumer available could the City step into those shoes. However, the tests as stated in *Cardinal Towing* and applied by the district court under review demonstrate that the question is much less superficial than that. Instead, the question is whether the City is acting in its own interest and to address a specific proprietary problem, rather than attempting to regulate an entire industry. *Cardinal Towing*, 180 F.3d at 693; *Stucky v. City of San Antonio*, 2000 WL 33348252, *2 (W.D. Tex., Apr. 4, 2000). Whether a consumer other than the City is available to make a towing decision, the ordinances and single-vendor towing system apply only to tows directed by the City from public streets and are aimed at eliminating the situations that arise from tow truck races to accident scenes, which serve to make the City's job of maintaining order on public ways more difficult. *Cardinal Towing*, 180 F.3d at 696 (explaining that City acts "in the pursuit of its own interests" in obtaining towing services "to maintain traffic flow in the wake of an accident and remove abandoned vehicles blighting their environment"). As explained by the district court:

> The City ordinances deal exclusively with City-directed tows; there is no effort by the City

> evidenced in the record to affect the conditions under which tow operators conduct their business otherwise. The City's policies do not reach the general towing industry or the availability of wreckers, the proper equipment, or response time required outside of City-directed tows. While the City's scheme does include consent tows, the City has argued that the inclusion narrowly addresses its proprietary concerns — the swift and efficient removal of disabled vehicles from City streets. . . . The Court cannot say that these concerns are not legitimate and certainly cannot say that they mask a desire on the part of the City to regulate its private towing companies.

Stucky, 2000 WL 33348252, at *4. The City is not attempting to regulate; instead, its efforts reflect the purchase of "services that its operations require in the open market." *Stucky*, 260 F.3d at 433; *see also Cardinal Towing*, 180 F.3d at 693 ("Courts have similarly shielded contract specifications from preemption when they applied to a single discreet contract and were designed to insure efficient performance rather than advance abstract policy goals").

Highlighting the erroneous reliance on consent versus nonconsent tows as the litmus test for determining whether the City is acting as participant or regulator, the Texas Legislature amended the definitions of consent and nonconsent tows on September 1, 2001. Specifically, "consent" tow has been clarified:

> "Consent tow" means any tow of a motor vehicle initiated by the owner or operator of the vehicle or by a person who has possession, custody, or

> control of the vehicle. The term does not include a tow of a motor vehicle initiated by a peace officer investigating a traffic accident or a traffic incident that involves the vehicle.

TEX. TRANSP. CODE § 643.201 (Vernon Supp. 2002). The Fifth Circuit, in its opinion denying the petitions for rehearing, dismissed the amendments as irrelevant, stating that the City could not escape the preemptive effect of section 14501(c) simply by redefining "consent tow." *Stucky v. City of San Antonio*, 266 F.3d 342 (5th Cir. 2001) ("The new statutory definitions add nothing to the City's failed argument that the mere presence of a city officer makes for a non-consent tow"). The Fifth Circuit rejected the relevance of the amendments though the court itself had relied on the legislative definitions to support its earlier decision and even though the system addressed by the Fifth Circuit in *Cardinal Towing* relied on definitions similar to those adopted by the amendment. *Stucky*, 260 F.3d at 434 n.11 ("We abide by those definitions"). What the amendment does is give weight to the district court's discussion of and focus on the City's goals, rather than whether the driver/owner has the capacity to consent, contrary to *Stucky*'s approach.

Furthermore, the limited scope of the City of San Antonio's towing system as a whole more closely approaches that allowed in *Cardinal Towing*, rather than the "industry licensing schemes and other industry wide regulations" which have been found within the preemptive effect of the FAAAA in *Petrey* and *Tocher*. Though the Fifth Circuit below recognized that the City's efforts did not come near those schemes struck down in *Petrey* and *Tocher*, it failed to recognize the limited scope of the City's system as a basis for rejecting the notion that the City acted in an attempt to

regulate the entire towing industry. *Stucky*, 260 F.3d at 437. Recognizing that it was "unable to determine, based on an analytically satisfying continuum, whether the instant Ordinances are within *Cardinal Towing*'s 'narrow scope,' " the *Stucky* Court turned to the purposes behind the ordinances, which it found to be safety. *Id.* at 437-38.

The parties below conceded that safety was the motivating factor, but the Fifth Circuit, in contrast with this Court's precedent, asked the wrong question. The question is not whether the City, in acting, is attempting to satisfy its duties as a governmental entity — it will *always* be attempting to accomplish those objectives. Instead, the question is, when the City acts, is it doing so in an effort to regulate or is it merely purchasing the services that are required for the accomplishment of its tasks. *Boston Harbor*, 507 U.S. at 227-33. The *Stucky* court went on to reject the argument that the safety purpose behind the ordinances affects the preemptive effect of the FAAAA on *nonconsent* tows. *Stucky*, 260 F.3d at 438 n.19 ("That the City may have initially entered into the single-vendor system for safety reasons, however, does not affect the analysis under *Cardinal Towing*"). In fact, that the City had as its purpose to maintain a safe accident scene, actually defeats any notion that the City was attempting to regulate the towing industry at large.

CONCLUSION

The construction placed upon the Federal Aviation Administration Authorization Act by the Fifth Circuit constrains a State's ability to regulate in the area of safety by delegating its authority to municipalities. That approach is contrary to this Court's precedent, other federal and state court decisions, and the express language of the FAAAA. Furthermore, in failing to recognize the ability of the City of

San Antonio to participate in the towing market, free from the FAAAA's preemptive effect, the Fifth Circuit has prohibited the procurement of services necessary for the City to carry out *its* duties and has erroneously ascribed a regulatory motive to the City based on a limited foray into the towing market. The Fifth Circuit itself has been inconsistent in its approach to the FAAAA's preemptive reach, and has demonstrated itself all too eager to find preemption in an area within the State's traditional police powers and without evidence of any regulatory intent on the City's part. Given the importance of these issues, the far-reaching consequences of the Fifth Circuit's decision, and the absence of uniformity among the circuits and among other federal and state courts on these questions, this Court should grant the petition for writ of certiorari and reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JULY 30, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50462

BRENDA L STUCKY, doing business as Bill's Wrecker Service; RICHARD VILLANEVA, doing business as Creswells 24 Hour Wrecker Service

Plaintiffs – Counter Defendants – Appellants

v.

CITY OF SAN ANTONIO

Defendant – Counter Plaintiff – Appellee

TEXAS TOWING CORPORATION

Intervenor Defendant – Counter Plaintiff – Appellee

Appeal from the United States District Court
for the Western District of Texas

Before KING, Chief Judge, and REAVLEY and JONES, Circuit Judges.

KING, Chief Judge:

Plaintiffs-Counter Defendants-Appellants Brenda Stucky and Richard Villaneva, owners of towing companies in San

Antonio, Texas, appeal the district court's grant of summary judgment in favor of Defendant-Counter Plaintiff-Appellee the City of San Antonio and Intervenor Defendant-Counter Plaintiff-Appellee Texas Towing Corporation. For the following reasons, we REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The City of San Antonio's Towing Laws

This case involves the tow truck operations of Defendant-Counter Plaintiff-Appellee the City of San Antonio (the "City"). In 1963, the San Antonio City Council passed Ordinance No. 31977, which prohibited tow trucks from removing disabled vehicles from public streets and ways without being directed to do so by the Chief of Police or his authorized representative. Ordinance No. 31977 was enacted to combat the acknowledged practice of tow truck operators monitoring police radios for reports of accidents and then racing to the scene of those accidents to obtain the business of towing the wrecked vehicles. All parties apparently agree that the "lively competition" of the rival tow truck operators interfered with accident investigations and the provision of emergency care required at the scene.[1]

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1. This competitive environment, which resulted in attendant safety concerns, was recognized by a Texas court of civil appeals:

> There is ample testimony to support the conclusion that the absence of restrictions on wrecker operators created

(Cont'd)

Appendix A

Ordinance No. 31977 was subsequently amended to give the Manager of the Public Works Department the same authority as the Police Chief or his authorized representative and is now codified at § 19-391 in the San Antonio City Code. The current version of § 19-391 provides in relevant part:

> It shall be unlawful for any person, in the operation of an automobile wrecker on the public streets and ways of the city and not having been directed to do so by the chief of police, the parking manager of the public works department or authorized representatives, knowingly to move, tow, haul or otherwise transport in, on or over the public streets and ways of the city any vehicle which has been abandoned or which has been involved in a collision and is on a public street, way or other public property.

SAN ANTONIO, TEX. CODE ch. 19, art. XI, § 19-391(a) (1986).

(Cont'd)

> serious problems. The not unusual situation was for several wreckers to appear at the scene of an accident, creating problems for officers who were attempting to restore the normal flow of traffic and seriously interfering with the efforts of police officers to investigate the accident and file the required reports. Wreckers were equipped with radios capable of monitoring the police frequencies. When the wreckers arrived on the scene of the accident they would engage in fiercely competitive efforts to induce the car owners to engage their services. The result was disorder and confusion at the scene of the accident.

Andrada v. City of San Antonio, 555 S.W.2d 488, 490 (Tex. Civ. App. – San Antonio 1977, writ dism'd).

Appendix A

Since 1977, the City has awarded its towing business to towing companies through an exclusive contract, whereby one company is the City's prime towing contractor for a certain period of time.[2] This contract provides that the designated city towing services company will "perform all necessary work for the removal from public streets, ways or other public property in the City of San Antonio, vehicles which have been abandoned, which have been involved in collisions, parking violations, vehicles to be checked for evidence, and vehicles belonging to prisoners." *See* San Antonio Wrecker Service Contract ¶ II.

In 1993, after considering the bids of four towing companies, the City approved a five-year exclusive contract with Intervenor Defendant-Counter Plaintiff-Appellee Texas Towing Corporation ("Texas Towing"). On April 1, 1993, Texas Towing was awarded the "Wrecker Service Contract" (the "Contract") by way of City Ordinance No. 77716. In 1995, Texas Towing requested an amendment to the Contract, which would grant the City the option to extend the Contract for an additional five years.[3] On August 31, 1995, the City

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2. In 1977, the City awarded an exclusive contract to City Towing Associates, Inc. In 1991, responding to complaints about anticompetitive and antitrust concerns, the contract with City Towing was amended to allow participation by subcontractors, with City Towing acting as the City's prime contractor.

3. Texas Towing requested this option in order to allow it to secure additional financing and capital investment for new equipment. In order to obtain this additional financing, Texas Towing needed assurances from the City that it would keep the Contract in place for an additional number of years.

passed Ordinance No. 82744, creating the option to extend the Contract. Pursuant to this option, on May 7, 1998, the Contract was extended for an additional five years (Ordinance No. 87775), without invitation to the towing industry to bid for the Contract. The City enforces this exclusive right, granted to the contractor, against any other towing company that attempts to contract with the operator of a disabled vehicle at the scene.

B. The Federal Law

In 1994, the United States Congress enacted the Federal Aviation Administration Authorization Act (the "FAAA Act") to deregulate the motor carrier industry. *See* Pub. L. 103-305, 108 Stat. 1569, 1608 (1994). Section 601 of the FAAA Act amended the Interstate Commerce Act, preempting state and local regulations concerning the price, route, or service of intrastate motor carriers.[4] In 1995, Congress passed the Interstate Commerce Commission Termination Act (the "ICCTA"), which took effect on January 1, 1996. *See* Pub. L. 104-88, 109 Stat. 803, 804 (1995) (codified at 49 U.S.C. § 14501(c)(1)). The ICCTA recodified former 49 U.S.C. § 11501(h) as 49 U.S.C. § 14501(c), and amended the statute to include an exemption for state regulation of nonconsensual tow rates. As will be discussed *infra* in more detail, § 14501 provides for federal authority over intrastate transportation.

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4. A "motor carrier" is defined as "a person providing motor vehicle transportation for compensation." 49 U.S.C. § 13102(12).

Appendix A

C. Plaintiffs'-Counter Defendants'-Appellants' Lawsuit

In December 1996, Brenda Stucky, doing business as Bill's Wrecker Service, and Richard Villaneva, doing business as Creswell's 24 Hour Wrecker Service (collectively referred to hereinafter as "Stucky"), sued the City for declaratory, injunctive, and monetary relief, alleging that § 19-391(a) and the City's exclusive Contract with Texas Towing pursuant to Ordinance No. 87775 (collectively referred to as the "Ordinances")[5] were preempted by 49 U.S.C. § 14501(c)(1) & (2). Stucky further alleged that enforcement of the Ordinances deprived it of a property and liberty interest, thus constituting a violation of 42 U.S.C. § 1983. Stucky later amended its complaint to include a Sherman Antitrust Act violation. In 1997, Texas Towing intervened in the lawsuit.

On July 14, 1997, Stucky filed a motion for partial summary judgment. The district court originally granted Stucky's motion for partial summary judgment, finding that § 14501(c)(1) preempted the Ordinances. Accordingly, the district court enjoined the City from further enforcement of the Ordinances. On a motion for reconsideration, however,

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5. To be clear, the "Ordinances" defined herein collectively include Ordinance No. 31977, now codified at § 19-391 in the San Antonio Code, and the Contract with Texas Towing, only as they relate to "consent" towing. The practice of nonconsent towing, also covered by the Ordinances, is not before us on appeal. As used in this opinion, the term "consent tow" refers to a tow made with the consent of the owner or operator and the term "non-consent" tow refers to a tow made without the consent of the owner or operator of the vehicle.

the district court vacated its initial grant of partial summary judgment. After further motions for summary judgment, the district court issued an Order on August 25, 1998, granting in part and denying in part the various motions for summary judgment.[6]

In its Order, the district court granted in part Stucky's motion for summary judgment, declaring that Ordinance No. 82744 (amending the contract to provide an option to extend) and Ordinance No. 87775 (exercising that option) were preempted by § 14501(c)(1), but that the City's single-vendor towing system based on the Ordinances was not preempted. Further, the district court denied the City's and Texas Towing's claim that the Ordinances were exempted from preemption under 49 U.S.C. § 14501(c)(2)(A). However, the district court granted in part the City's and Texas Towing's motions for summary judgment, such that Stucky's claims for relief under 42 U.S.C. § 1983 and for monetary damages arising from violations of federal antitrust law were dismissed with prejudice. Finally, with respect to Stucky's claims for injunctive relief arising from antitrust law, the district court denied the City's and Texas Towing's summary judgment motions. On October 13, 1998, the district court entered final judgment in accordance with the Order. The parties appealed.

On appeal, after briefing and oral argument, this court decided *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999). On August 14, 1999, another panel of this court vacated the district court's

6. As the specific motions and counter-motions are not dispositive to this case, descriptions of these procedural filings have been omitted from this recitation.

judgment and remanded it to the district court in light of *Cardinal Towing*. *See Stucky v. City of San Antonio*, 204 F.3d 1115 (5th Cir. 1999) (unpublished table decision). On remand, the district court again considered summary judgment motions addressing whether federal law preempts the City's Ordinances as they relate to consensual towing.

Based on its interpretation of *Cardinal Towing*, the district court held on remand that § 14501(c)(1) did *not* preempt the Ordinances as they related to the issue of consent towing. The district court, therefore, granted the City's and Texas Towing's motions for summary judgment on the issue whether the City's practice of contracting with a single towing company for consensual tows was preempted by federal law.[7] Finally, the district court denied Stucky's motion for partial summary judgment.

Stucky timely appeals this judgment.

II. STANDARD OF REVIEW

The district court's preemption ruling is a determination of law and, therefore, is subject to *de novo* review. *See Kollar v. United Transp. Union*, 83 F.3d 124, 125 (5th Cir. 1996); *see also Branson v. Greyhound Lines, Inc.*, 126 F.3d 747, 750 (5th Cir. 1997) ("We review *de novo* the district court's rulings on preemption."). Moreover, this court reviews a grant

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7. The district court also denied the City's and Texas Towing's motion for summary judgment on the issue of injunctive relief for alleged antitrust violations. However, on May 17, 2000, the district court amended its judgment and dismissed the remaining antitrust claims against the City and Texas Towing.

of summary judgment *de novo*, viewing the evidence in the light most favorable to the nonmovant. *Smith v. Brenoettsy*, 158 F.3d 908, 911 (5th Cir. 1998); *see also Tolson v. Avondale Indus., Inc.*, 141 F.3d 604, 608 (5th Cir. 1998). "Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting FED. R. CIV. P. 56(c)). The moving party bears the burden of showing the district court that there is an absence of evidence to support the nonmoving party's case. *See id.* at 325. "If the moving party fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response. If the movant does, however, meet this burden, the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995). "A dispute over a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Smith*, 158 F.3d at 911 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The substantive law determines which facts are material. *See Anderson*, 477 U.S. at 248.

III. PREEMPTION BY 49 U.S.C. § 14501(c)(1)

This is the second time this court has been asked to address the preemptive reach of 49 U.S.C. § 14501(c)(1). In *Cardinal Towing & Auto Repair Inc. v. City of Bedford, Texas*, we held that the City of Bedford's ("Bedford") single-contract towing ordinance for nonconsensual towing services was not

preempted by § 14501(c)(1) because Bedford was acting as a "market participant" and not a "market regulator" in procuring towing services for individuals who could not consent to a towing company. *See* 180 F.3d 686, 697 (5th Cir. 1999). The instant case presents the question whether our analysis in *Cardinal Towing* also holds for a single-contract towing ordinance that governs *consensual* towing services. As will be discussed *infra* in detail, we conclude that the rationale of *Cardinal Towing* cannot be extended to the consent tow situation, and that § 14501(c)(1) preempts the City's Ordinances as they relate to consensual towing. However, this conclusion does not resolve the more difficult question that has split our sister circuits — whether the City's single-contract towing ordinance falls under the "safety exemption" provided in § 14501(c)(2)(A). This question will also be addressed below.

Because of the closeness of the questions before us, we set forth in some detail our preemption analysis under the reasoning of *Cardinal Towing*, guided by the other circuit courts of appeals that have addressed the preemptive effect of § 14501(c)(1). We begin first with the general preemptive reach of § 14501(c)(1).

A. Preemption Principles

The doctrine of federal preemption is rooted in the Supremacy Clause of the United States Constitution, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land[,] . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. "As a consequence, state and local laws

are preempted where they conflict with the dictates of federal law, and must yield to those dictates." *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 771 (2d Cir. 1999); *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 542 (11th Cir. 1998) ("[S]tate law that conflicts with federal law is 'without effect.' " (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992))). Standards governing preemption of state law also govern preemption of municipal ordinances. *See Cardinal Towing*, 180 F.3d at 690.

Federal law preempts state and local laws whenever (1) Congress has expressly preempted state action; (2) Congress has devised a comprehensive regulatory scheme in the area, thus "removing the entire field from the state realm"; or (3) state action directly conflicts with the "force or purpose" of federal law. *See id.* Thus, "[p]reemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Ace Auto*, 171 F.3d at 771 (citations and internal quotations omitted). "However, when preemption is invoked to prevent a state or municipality from wielding its traditional police powers, congressional intent to displace that authority must be 'clear and manifest.' " *Cardinal Towing*, 180 F.3d at 690 (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989)). "Congressional intent, therefore, is the 'ultimate touchstone' of preemption analysis." *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1045 (9th Cir. 2000) (quoting *Cipollone*, 505 U.S. at 516).

B. Express Preemption Under 49 U.S.C. § 14501(c)(1)

In *Cardinal Towing*, this court recognized that by enacting the FAAA Act, Congress intended to deregulate the motor carrier industry, including the towing services industry. *See* 180 F.3d at 690 ("In 1994, Congress moved to deregulate the motor carrier industry. Central to this effort was a section preempting most state and local regulation."). In this effort, the FAAA Act expressly included a general preemption provision, now recodified in the ICCTA as § 14501(c)(1):

> General rule. — Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1).

The purpose of this provision was to eliminate overlapping state and municipal regulations, which increased costs, decreased efficiency, and reduced competition and innovation in the towing services industry. *See Tocher*, 219 F.3d at 1048 (citing H.R. CONF. REP. No. 103-677, at 87 (1994)). "Congress recognized that dispersing regulatory authority over motor carriers would require a towing company to adhere to a multitude of different regulatory schemes in every locality where it conducted business and virtually destroy any opportunity for companies to maintain national or even regional standards for conducting business."

Id. at 1048; *see also Ace Auto*, 171 F.3d at 772. Towing service companies have been recognized as motor carriers under § 14501(c) and are thus covered by the statute's reach. *See Cardinal Towing*, 180 F.3d at 691 ("[T]owing companies performing nonconsensual tows are 'motor carriers.' ").[8]

Based on the recognized purpose and a plain reading of the terms of § 14501(c)(1), every circuit court of appeals to have addressed the preemption issue has concluded that § 14501(c)(1) manifests a general congressional intent to preempt state and municipal ordinances that regulate the prices, routes, or services provided by towing companies. *See Petrey v. City of Toledo*, 246 F.3d 548, 554 (6th Cir. 2001); *Tocher*, 219 F.3d at 1048; *Ace Auto*, 171 F.3d at 774;

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8. This recognition derives from the addition of a limited exemption to § 14501(c)(1) added in the ICCTA that specifically exempts from preemption a state's or a political subdivision's regulation of the price of nonconsensual tows. *See* 49 U.S.C. § 14501(c)(2)(C). As the Court of Appeals for the Eleventh Circuit recognized:

> If Congress had not intended for § 14501(c)(1) to preempt state and local regulation of towing services generally, Congress would not have included an express exemption that applies solely to prices charged for nonconsensual towing services. . . . By including an express exemption for the regulation of prices for nonconsensual towing services, Congress has evinced its intent that all aspects of consensual towing services remain subject to the general rule set forth in the preemption clause.

Mayer, 158 F.3d at 543.

Mayer, 158 F.3d at 545.[9] This determination that municipal regulations of towing services are generally preempted by § 14501(c)(1) comports with our conclusion in *Cardinal Towing* that, unless one of the exemptions to federal preemption applies, municipal regulations like the challenged Ordinances in the present case are preempted.

With this background as guidance, we next address two possible exemptions to federal preemption under § 14501(c)(1): (1) the generally recognized "municipal-proprietor" exemption to preemption and (2) the "safety exemption" provided for in 49 U.S.C. § 14501(c)(2)(A).[10]

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9. This conclusion is further supported by the House Report accompanying the proposed version of § 14501(c)(2)(C), which states that the purpose behind the amendment is to:

> provide[ ] a new exemption from the preemption of State regulation of intrastate transportation relating to the price of non-consensual tow truck services. This is only intended to permit States or political subdivisions thereof to set maximum prices for non-consensual tows, and *is not intended to permit re-regulation of any other aspect of tow truck operations*. The Committee had been asked to go farther and permit States and political subdivisions thereof to re-regulate all aspects of non-consensual tow truck services. The Committee provision struck a balance between the need to protect consumers from exorbitant towing fees and the need for a free market in towing services.

H.R. REP. No. 104-311, at 119-20 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 831-32 (emphasis added).

10. The safety exemption in § 14501(c)(2)(A) provides:

(Cont'd)

The district court found that the municipal-proprietor exemption applied to the Ordinances and, thus, they were not subject to federal preemption under § 14501(c)(1). The district court did not address the safety exemption. We address each in turn.

IV. EXEMPTIONS FROM FEDERAL PREEMPTION

A. The Proprietary Exemption Under Cardinal Towing

1. The Cardinal Towing Decision

In *Cardinal Towing*, this court applied the "municipal-proprietor" exemption (also known as the "market-participant" exemption) to the preemptive language of 49 U.S.C. § 14501(c)(1). *See* 180 F.3d at 694-95. We need not reiterate the careful analysis of this doctrine set forth by the *Cardinal Towing* court, *see id.* at 691-95, except insofar as to emphasize the primary legal conclusions necessary to our decision.

(Cont'd)

(2) Matters not covered. — Paragraph (1) —

> (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

49 U.S.C. § 14501(c)(2)(A).

First, the *Cardinal Towing* court recognized that preemption policies apply only to state "regulation" and not to actions that the state takes in its proprietary capacity. *See id.* at 691 ("The law has traditionally recognized a distinction between regulation and actions a state takes in a proprietary capacity — that is to say, actions taken to serve the government's own needs rather than those of society as a whole."); *see also Bldg. & Constr. Trades Council v. Assoc. Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 227 (1993) (recognizing, in National Labor Relations Act cases, that "[o]ur decisions . . . support the distinction between government as regulator and government as proprietor"); *cf. Wis. Dep't of Indus. Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 289 (1986) (holding, in the Commerce Clause arena, that attempt to use spending power in a manner "tantamount to regulation" is subject to federal preemption); *Petrey*, 246 F.3d at 558; *Tocher*, 219 F.3d at 1049-50.

Second, the *Cardinal Towing* court determined that this distinction between a state acting in its regulatory capacity in contrast to its proprietary capacity is most readily apparent when the government purchases the goods and services that its operations require in the open market. *See Cardinal Towing*, 180 F.3d at 691, 692 ("Most government contracting decisions do not constitute concealed attempts to regulate . . . [because i]n order to function, government entities must have some dealings with the market."). The court cautioned that while the government can exert substantial leverage through its spending power and while this power "may create a temptation to take advantage of these interactions to pursue policy goals," *id.* at 692, that at the same time, the fact of

government involvement cannot be "assumed to be motivated by a regulatory impulse." *Id.*

Third, the court applied a two-part analysis to aid in "distinguishing between proprietary action that is immune from preemption and impermissible attempts to regulate through the spending power." *Id.* at 693. The court suggested asking two questions to evaluate the government action:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?

Id. The court explained that "[b]oth questions seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out." *Id.*

Finally, the court applied this two-part analysis to the nonconsent towing ordinance at issue, and held that Bedford's action of contracting with a single towing service for nonconsent tows was a proprietary action and, therefore, not preempted by federal law. *See id.* at 697 ("[T]he City's actions here did not constitute regulation or have the force and effect of law. Accordingly, they are not preempted by section 14501(c).").

As to the first question, whether Bedford acted in its own interest in obtaining services comparable to a private entity in similar circumstances, the *Cardinal Towing* court recognized that because the ordinance involved only "true nonconsent tows where the owner of the vehicle was unwilling or unable to specify a towing company," *id.* at 694, Bedford was purchasing services from the market in place of the consumer. In this situation, "the owner of the vehicle will by necessity be unable to choose a towing company" and "the only party that can make the type of merit selection inherent in market transactions is the party ordering the tow," namely the City of Bedford. *See id.* at 695. Because Bedford was purchasing towing services for an incapacitated or unwilling individual, it was in no different position than any other private actor. Thus, the court recognized that the need to purchase towing services in the nonconsent situation was not motivated by a "regulatory impulse," but instead was motivated by the need for a service to be performed:

> [N]onconsensual tows do not involve any opportunity for market interaction on the part of the owner of the vehicle. The real decision is made by the party who ordered the tow, who chooses both to remove the vehicle and the party to perform the service. And whether the ordering party is the City or a private property owner, it seeks out this service in the pursuit of its own interests.

Id. at 696.

Regarding the second question, the *Cardinal Towing* court recognized that because the scope of the ordinance was

narrow, focused on a single contract covering only a portion of the towing services market, the primary goal of the ordinance was to address a specific problem and not to encourage a general policy. The court distinguished situations involving "licensing" schemes and ordinances that affect industries as a whole, *see id.* at 693 n.2. (citing *Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F. Supp. 711, 726 (S.D. Tex. 1996)), and held that "the limited scope here decisively forecloses an inference that the City sought to change the tow truck industry as a whole, let alone influence society at large." *Id.* at 694.

2. Application of Cardinal Towing to the Ordinances

Both parties agree that *Cardinal Towing* controls our analysis. Stucky argues that the consent/nonconsent distinction is dispositive because it defines the consumer of the towing service and thus clarifies whether the City is acting as a consumer or as a regulator. Stucky concedes that in a nonconsent tow situation, because the driver of the vehicle is, by definition, not available, the City becomes the consumer and plays the market-participant role of choosing a towing service. Stucky contends that, by contrast, in a consent tow situation, the driver of the disabled vehicle is the market actor, and when the City by statute chooses a towing service for that individual, it is regulating, not purchasing services in a proprietary manner.

Applying *Cardinal Towing*'s two-part analysis, Stucky argues that there is no need for the City efficiently to procure services in the consent tow situation because private parties are capable of contracting with a towing services themselves.

Further, Stucky asserts that the City's decision to define all accident tows as nonconsent tows[11] demonstrates the regulatory, as opposed to the proprietary, nature of the ordinances. As Stucky argues, it is only through its police

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11. Throughout this litigation, the City has contended that all tows from the scene of accidents on public streets and roadways are nonconsensual by virtue of § 19-391, which places all authority to direct towing of vehicles with police or municipal officials. Recognizing that such a definition was "problematic," the district court stated:

> In the first place, the State of Texas has defined consent and non-consent tows by statute. *See* TEX. TRANS[P]. CODE § 643.201(e) (defining "consent tow" as a tow made with the consent of the owner or operator and "non-consent" tow as a tow made without the consent of the owner or operator of the vehicle). In the second place, the City cannot, by sleight of hand (or language) simply eliminate the concerns addressed by the inquiry regarding whether a tow is consensual or nonconsensual. . . . It cannot be the case that simply redefining what a consent tow is eliminates that concern. Therefore, the City's case . . . must rise or fall on the assumption that its ordinances pertain to both consent and nonconsent tows, as such tows are defined by state statute.

Stucky v. City of San Antonio, No. CIV.A.SA96CA128EP, 2000 WL 33348252, at *3 (W.D. Tex. Apr. 4, 2000). We agree that the City's argument is unpersuasive. Under § 643.201(e)(2) & (e)(4) of the Texas Transportation Code, the state has set forth the definition of consent and nonconsent tows. *See* TEX. TRANSP. CODE ANN. § 643.201(e)(2) & (e)(4) (1999); *see also Fort Bend County Wrecker Ass'n v. Wright*, 39 S.W.3d 421, 424 n.3 (Tex. App. – Houston [1st Dist.] Feb. 22, 2001). We abide by those definitions.

power to regulate that the City is able to classify all accident tows as nonconsensual, thus empowering itself with the authority to direct which towing service will perform the tow.

As to the second part of the *Cardinal Towing* analysis, Stucky argues that the regulatory policy affects the competitive environment for the entire consent towing industry. Specifically, Stucky contends that the City is preventing all towing companies (except for Texas Towing) from competing in the City-authorized consent towing market. Further, the City is frustrating existing contracts that towing companies may have with vehicle owners (through dealerships, insurance carriers, or automobile organizations). Stucky contends that such regulatory power, which can exclude other competitors from the market, is not a characteristic shared by private economic parties in similar circumstances.

In response, the City[12] argues that, as in *Cardinal Towing*, it shares a similar propriety interest in contracting with a single towing service for all (i.e., consent and nonconsent) City-authorized tows. The City points to issues of efficiency of service, guaranteed response time, twenty-four hour service, training, safety records, a clarification of responsibility, and easier administrative duties as reasons why the City has a proprietary interest in a single contract system. The City does not differentiate between consent tows and nonconsent tows, arguing that the issues of efficiency and safety do not depend on whether the driver is present to make

12. Because the City and Texas Towing provide similar legal arguments, all references to the City's arguments should be interpreted to refer to the Appellees' collective arguments.

a decision. The City contends that it "is a market participant because the City's responsibility to control the public streets, and to ease traffic congestion resulting from car wrecks remain, regardless of whether the tow is a consent or nonconsent tow." Further, the City contends that San Antonio, as the ninth largest city in the United States, spanning 417 square miles, requires a towing service that can address its needs. The City contends that its proprietary interest is heightened because of the large-scale operation involved in providing towing services to such a large city.

Regarding the second part of the *Cardinal Towing* analysis, the City argues that the Ordinances are narrowly drawn to address a single proprietary problem. For example, the challenged Ordinances do not restrict towing services involving customers who request towing from private property or towing services involving consensual tows from accidents in which the car was legally parked prior to the accident (provided it was not a traffic hazard).

While we concede that the City has a compelling practical argument for its need for efficient and safe towing services, we cannot ignore the express mandate of Congress to preempt such regulation of towing services. *See* 49 U.S.C. § 14501(c)(1). As has been demonstrated and will be discussed further *infra*, § 14501(c)'s purpose was to encourage competition in the intrastate towing services market. *See Petrey*, 246 F.3d at 554; *Tocher*, 219 F.3d at 1046; *Ace Auto*, 171 F.3d at 772; H.R. CONF. REP. No. 103-677 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758-59. Accident towing, broadly defined as responding to any disabled vehicle on any public street, is without question a

significant portion of the towing services market. Thus, a single contract system, which prevents consumers from consenting to hiring a towing service other than the one authorized by the City, does little to foster that market competition.

Further, the logic of *Cardinal Towing* compels us to find that a different market situation exists in the consent towing market than in the nonconsent towing market. Had this distinction not been critical to the court's holding in *Cardinal Towing*, much of the court's analysis would have been unnecessary.[13] Therefore, applying the two-part analysis, we must agree with Stucky that the City, in enacting and enforcing the Ordinances that control consent tows, cannot be said to be acting as a market participant and, thus, cannot be exempted from § 14501(c)(1) under the municipal-proprietor exemption.

First, in the consent tow situation, unlike the nonconsent tow situation, there are two competing market actors attempting to purchase services. Each market actor may wish to obtain towing services "in keeping with the ordinary behavior of private parties." *Cardinal Towing*, 180 F.3d at 693. The challenged Ordinances, however, frustrate the normal working of private decisionmaking in a market. Under the Ordinances, if a private party wishes to employ the services of Towing Company "A" and the City wishes to employ the services of Towing Company "B", the City's choice controls. This is so, not because the City needs to

13. For example, the court simply could have stated that all City tows purchased by the City on public property were proprietary and, thus, exempt from § 14501(c)(1) preemption.

purchase the service for its own proprietary interest (i.e., "to serve the government's own [towing] needs"), but for the related safety interests of "society as a whole" (i.e., controlling public streets and easing traffic congestion). *See id.* at 691. Thus, if we are to compare the City's actions to the "typical behavior of private parties," as *Cardinal Towing* instructs us to do, the conflict is readily apparent. In the consent tow situation, by countermanding a private party's choice of towing company, the City is acting at cross-purposes with the private party's market decision.

Furthermore, the City's market power cannot be said to be typical of similar private actors. In utilizing its police power to control a significant portion of the towing industry, the City's actions have the direct economic effect of contracting the market. This effect does not speak to a private proprietary purchase, but rather to a public regulatory plan. *See Tocher*, 219 F.3d at 1049 ("In analyzing the [municipal-proprietor] exception, it is vital to examine the substance of the transaction because a city may not use the guise of privity of contract to conduct otherwise forbidden regulatory activity." (citations and internal quotations omitted)).

Second, this court in *Cardinal Towing* relied on the "narrow scope" of the ordinance whereby the City "limited itself only to true nonconsent tows." *Id.* at 694.[14] Also important, was the fact that the ordinance involved "a single

14. Following *Cardinal Towing*, the Courts of Appeals for the Sixth and Ninth Circuits have both held that *nonconsensual* towing ordinances are exempt from preemption based on a municipal-proprietor/market-participant analysis. *See Petrey*, 246 F.3d at 559; *Tocher*, 219 F.3d at 1049.

discreet [sic] contract." *See id.* at 693; *see also Bldg. & Constr. Trades Council*, 507 U.S. at 227 ("[T]he challenged action in this litigation was specifically tailored to one particular job.").

In the instant case, the scope of the Ordinances is obviously broader than the ordinance involved in *Cardinal Towing* because the Ordinances encompass all City-authorized (consent and nonconsent) tows. This scope, however, does not reach the level of industry licensing schemes and other industry-wide regulations previously held to be preempted by § 14501(c)(1). *See Petrey*, 246 F.3d at 564; *Tocher*, 219 F.3d at 1050. The scope of the Ordinances, therefore, falls somewhere in between these two established poles of existing precedent. Because we are unable to determine, based on an analytically satisfying continuum,[15] whether the instant Ordinances are within *Cardinal Towing*'s "narrow scope," we turn to evaluate the purpose of the regulation. *See Cardinal Towing*, 180 F.3d at 692 (recognizing that courts have looked to whether "government entities seek to advance general societal goals rather than narrow proprietary interests through the use of their contracting power").

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15. In order to determine the "scope" of the challenged action, the particulars of each market and the economic effect on the relevant market actors must be addressed. The difficulty in the instant case is that the record does not provide relevant information about the extent of City-authorized (consent and nonconsent) tows in proportion to the entire towing services industry in San Antonio. We are told that 50,000 tows were requested by the City in 1993; however, we do not have the denominator figure from which to compare that number to the entire towing industry.

As originally conceived, the Ordinances were a response to safety concerns affecting the City at large and were intended to be regulatory, and not proprietary, in nature. The enabling language of the original Ordinance No. 31977 (now codified as § 19-391), provides that the reason for enacting the Ordinances was to regulate and control the practice of tow truck drivers from racing to the scenes of accidents.[16]

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16. Ordinance No. 31977 reads in relevant part:

> Whereas, the City of San Antonio is the guardian of the public rights in the public streets, ways and public property within said City and holds title for the benefit of the public, and
>
> Whereas, past experience indicates that automobile wreckers frequently race to the scene of automobile accidents in the hope of securing the business of towing in disabled motor vehicles for repairs, and . . .
>
> Whereas, the efforts of the City police to control the aforementioned practices of automobile wrecker operators have not been successful, and
>
> Whereas, the aforementioned practices of automobile wrecker operators offend against the public peace, safety and welfare of the City of San Antonio and require regulations and control, and
>
> Whereas, in order to prevent confusion and traffic congestion which endanger public health, safety and property of the City of San Antonio it is deemed expedient, desirable and necessary to adopt regulations controlling the operation of automobile wreckers upon the public streets and ways of the City of San Antonio. . . .

San Antonio, Tex., Ordinance No. 31977 (Dec. 12, 1963).

Ordinance No. 31977 explicitly stated that the City was acting as "the guardian of the public rights in the public streets, ways and public property" and that its purpose was to protect the "public peace, safety and welfare of the City of San Antonio." Ordinance No. 31977 then explicitly provided that the City "deemed it expedient, desirable and necessary to adopt *regulations* controlling the operation of automobile wreckers upon the public streets and ways" of the City (emphasis added).

The original Ordinance No. 31977 has been amended and codified, but nothing in the record contradicts the conclusion that safety considerations to benefit "general societal interests" controlled all subsequent amendments to the Ordinances. Affidavits from the Chief of Police, the Police Captain in charge of vehicle storage, and the Deputy Chief of Police of the Support Services Division, in charge of overseeing the Vehicle Storage Unit, all support the understanding that the reason the City chose to regulate towing and selected a single-vendor system was to improve public safety.[17] In both the City's and Texas Towing's briefs

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17. For example, Ron Bruner, the Police Captain in charge of vehicle storage at the San Antonio Police Department and Commander of the Community Services Section that oversees the Vehicle Storage Unit, stated in his affidavit:

> When developing and implementing towing policies for a municipality such as the City of San Antonio, the most critical issue is the danger to public safety arising from the obstruction of City streets and highways after vehicular accidents. The City of San Antonio has chosen

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and at oral argument, the parties agreed that safety was the primary consideration behind the passage and continued enforcement of the Ordinances.[18] Thus, unlike the proprietary-focused ordinance at issue in *Cardinal Towing*, the City's Ordinances have a broader regulatory purpose.[19]

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> to protect the public safety by contracting with a single towing company to provide services at the request of the City.

Jerry Pittman, the Deputy Chief of Police, Support Services Division, also echoed this understanding by stating: "The number one concern of the City in relation to towing situations is the safety of the public."

18. Finally, we note that, under state law, the regulation of traffic is a regulatory function of a municipality and not a proprietary function. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a)(21) (1997) (recognizing the "regulation of traffic" as one of the functions exercised by the municipality in the interest of the general public); *Murillo v. Vasquez*, 949 S.W.2d 13, 17 (Tex. App. – San Antonio 1997, writ denied) (recognizing that the regulation of traffic is a "classic" example of a governmental regulatory function).

19. We recognize, of course, that this same "purpose" underlies the nonconsent tows covered by the Ordinances. That the City may have initially entered into the single-vendor system for safety reasons, however, does not affect the analysis under *Cardinal Towing*, that nonconsensual tows can escape federal preemption under the municipal-proprietor/market-participant exemption. The logic of the first part of the *Cardinal Towing* analysis demonstrates the proprietary nature of the City's need to procure towing services in the nonconsent towing situation. The issue has been decided and is not before us on appeal.

Therefore, because the Ordinances restrict market competition, because the primary goal of the Ordinances is to regulate and improve the safety of the towing services on City streets, and because the Ordinances affect a significant portion of the towing industry in San Antonio, we conclude that the challenged actions of the City are regulatory in nature and cannot escape federal preemption under § 14501(c)(1) by way of the municipal-proprietor exemption. Simply stated, the government interaction with the market is not so narrowly focused that we can "safely rule out" the "regulatory impulse" of the City. *See Cardinal Towing*, 180 F.3d at 693.

Having determined that the municipal-proprietor/market-participant rationale applied in *Cardinal Towing* cannot be applied to the consensual towing situation in the City of San Antonio, we next turn to whether the Ordinances can be exempted under the statutory safety exception provided for in § 14501(c)(2)(A).

B. The Safety Exemption Under 49 U.S.C. § 14501(c)(2)(A)

The second relevant exception to the preemption doctrine is the "safety exemption" contained in § 14501(c)(2)(A), which provides:

> (2) Matters not covered. — Paragraph (1) [§ 14501(c)(1)] —
>
> > (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority

> of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

49 U.S.C. § 14501(c)(2)(A). The City argues that even if it cannot be considered a market participant in the consent tow situation, because the Ordinances were enacted to address safety concerns arising from the towing practices in the City, § 14501(c)(2)(A) should be interpreted to exempt the Ordinances from federal preemption. The City asserts that because § 14501(c)(2)(A) provides that the safety regulatory authority of a State shall not be restricted with respect to motor vehicles, this reserves the authority of the State to delegate its regulatory power to municipalities like the City.[20] The City contends that because states have traditionally redelegated regulatory powers to municipalities, and because Congress did not clearly or manifestly preempt this redelegation authority, § 14501(c)(2)(A) covers municipal safety ordinances that are enacted pursuant to a delegation of state authority.

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20. The State of Texas has, in fact, delegated this authority to municipalities. *See* TEX. TRANSP. CODE ANN. § 643.201(a) (1999) ("[A] municipality may regulate the operation of a tow truck to the extent allowed by federal law."); *Northway Towing, Inc. v. City of Pasadena, Tex.*, 94 F. Supp. 2d 801, 802 (S.D. Tex. 2000) ("[T]he State of Texas has specifically delegated its authority to regulate towing to its political subdivisions.").

Stucky, in contrast, argues that § 14501(c)(2)(A) does not save the City's towing Ordinances from preemption because § 14501(c)(2)(A) is directed only at the authority of the state and not the political subdivision of the state. Stucky points to the fact that the general preemption language in § 14501(c)(1) covers a "state [or] political subdivision of a State," but that the text of § 14501(c)(2)(A) omits the phrase "political subdivision of the State." Stucky asserts that this omission was intentional and that it furthers the deregulatory purpose of the statute. Therefore, Stucky contends that the City cannot circumvent the express language of the statute by relying on a redelegation of state authority.

This court was not required to address this provision in *Cardinal Towing*; however, other courts have confronted the safety exemption in § 14501(c)(2)(A) and have disagreed on its application to municipal ordinances such as the ones at issue. The Courts of Appeals for the Sixth, Ninth, and Eleventh Circuits have each held that § 14501(c)(2)(A) does not exempt municipal ordinances from the general preemptive reach of § 14501(c)(1). *See Petrey*, 246 F.3d at 563; *Tocher*, 219 F.3d at 1051; *Mayer*, 158 F.3d at 545-47. However, the Second Circuit and several district courts in this circuit have come to the opposite conclusion, finding that § 14501(c)(2)(A) explicitly exempts safety-focused municipal towing ordinances from § 14501(c)(1). *See Ace Auto*, 171 F.3d at 774-75; *Northway Towing, Inc. v. City of Pasadena, Tex.*, 94 F. Supp. 2d 801, 802 (S.D. Tex. 2000); *Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F. Supp. 711, 726 (S.D. Tex. 1996); *New Orleans Towing Ass'n v. City of New Orleans*, No. Civ.A.99-3131, 2000 WL 193071, at *3 (E.D. La. Feb. 12, 2000);

Appendix A

AJ's Wrecker Serv., Inc. v. City of Dallas, No. Civ.A.3:97-CV-1311D, 1998 WL 185521, at *3 (N.D. Tex. Apr. 15, 1998).

Because of the closeness of the issue and the soundness of the arguments on either side, we set forth the contrasting arguments below. As is our practice in questions of statutory interpretation, we look to the text, structure, and legislative history of the provision in question. *See City of Dallas, Tex. v. Fed. Communications Comm'n*, 118 F.3d 393, 396 (5th Cir. 1997). We also address the determinations made by our sister circuits and the district courts in this circuit that have confronted this difficult issue.

1. Statutory Language and Structure

"Interpretation of the statutory language is key to construing its preemptive force." *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335-36 (5th Cir. 1995). Furthermore, in order to discern Congress's intent, we must examine the language of § 14501(c)(2)(A) in the context of the legislation of which it is a part. *See Bennett v. Spear*, 520 U.S. 154, 173 (1997) (recognizing that statutory provisions must be examined in the context of the entire statute).

In reviewing the text and structure of § 14501(c)(2)(A), the express statutory language does not provide for municipalities or other "political subdivisions of a State" to be exempted from the preemptive reach of § 14501(c)(1). For this reason, several circuit courts of appeals have found that Congress did not intend for municipalities to be exempted from preemption, even for safety reasons. "The

language of § 14501 provides fairly convincing evidence that the safety regulation exception to preemption was not meant to apply to a state's political subdivisions. . . . [W]ithin § 14501, 'political subdivision[s]' are mentioned seven times, yet the term is not mentioned at all in § 14501(c)(2)(A)." *Petrey*, 246 F.3d at 561. Similarly, as the Eleventh Circuit recognized in *Mayer*:

> [Section] 14501 contains no fewer than seven express references to the regulatory authority of the political subdivisions of the states in its other subsections, §§ 14501(a), 14501(b), 14501(c)(1), 14501(c)(2)(C), 14501(c)(3)(A), 14501(c)(3)(B), and 14501(c)(3)(C), but omits any references to political subdivisions in § 14501(c)(2)(A). . . . In fact, § 14501(c)(2)(A) is the *only* subsection of the statute that mentions the regulatory authority of a state without also mentioning the regulatory authority of the state's political subdivisions.

Mayer, 158 F.3d at 545; *see also Tocher*, 219 F.3d at 1051 ("[S]ection 14501 contains no less than seven references to the regulatory authority of political subdivisions, but is conspicuously silent in section 14501(c)(2)(A).").

These courts have relied on the general presumption that when "Congress omits certain language in a particular subsection of a statute and includes the language in other subsections, the omission is intentional rather than accidental." *Mayer*, 158 F.3d at 545; *see also Tocher*, 219 F.3d at 1051 (" 'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts

intentionally and purposely in the disparate inclusion or exclusion.' " (quoting in parenthetical *Russello v. United States*, 464 U.S. 16, 23 (1983)). These courts have concluded that the omission of the statutory language was deliberate and not a drafting error: "We cannot say that Congress simply made a mistake by failing to include political subdivisions in the exception to preemption in § 14501(c)(2)(A). Instead, Congress's silence in failing to include political subdivisions in § 14501(c)(2)(A) clearly indicates that municipal safety regulation was not meant to be exempted from preemption." *Petrey*, 246 F.3d at 563; *Mayer*, 158 F.3d at 545-46 ("We find it unlikely that this omission reflects a drafting error, because a similar preemption provision contained in the Airline Deregulation Act, 49 U.S.C. § 41713(b)(4)(B)(I), contains the same omission.").

These courts have also recognized that "[t]he Act itself defines the term 'State' to 'mean[ ] the 50 States of the United States and the District of Columbia,' and therefore provides no justification for reading the term 'State' to include its political subdivisions." *Mayer*, 158 F.3d at 545; *see also Tocher*, 219 F.3d at 1051 ("The term 'State' under the FAAA is defined as 'the 50 States of the United States and the District of Columbia' . . . and a plain reading of this provision indicates that municipalities are not included within that definition."). Further, the statutory language of § 14501(c)(2)(A) only addresses State regulation of "motor vehicles" and not the "motor carriers" at issue under the towing Ordinances.[21] As a result, based on the text and

21. "Motor vehicle" is defined as "a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and

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structure of § 14501(c)(2)(A), these courts have declined to apply the safety exemption to municipal ordinances.

In contrast, the Second Circuit and certain federal district courts in this circuit have come to an opposite conclusion based on their interpretation of the statutory language. In *Ace Auto*, the Second Circuit concluded that, while the text of § 14501(c)(2)(A) does not preserve the regulatory authority of political subdivisions of the state, "we see no reason to construe this language to prevent the state from delegating *its* regulatory authority to a municipality." *Ace Auto*, 171 F.3d at 765. In similar fashion, a district court in the Southern District of Texas found that congressional delegation of "regulatory authority to a state may well mean that it is permitted to redelegate its authority to a political subdivision either specifically or by leaving undisturbed existing statutes that would otherwise provide a local government with ample authority to regulate." *Harris County Wrecker*, 943 F. Supp. at 726 (citations, internal quotations, and alterations omitted).

Both courts relied on *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991), for their interpretation of § 14501(c)(2)(A). *See Ace Auto*, 171 F.3d at 765; *Harris County Wrecker*, 943 F. Supp. at 726. In *Mortier*, the Supreme Court held that under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), states were permitted to redelegate authority to political subdivisions even without

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used on a highway in transportation, or a combination determined by the Secretary, but does not include a vehicle, locomotive, or car operated only on a rail . . . ." 49 U.S.C. § 13102(14). The definition of "motor carrier" is set out *supra* in note 4.

explicit statutory language so providing. *See* 501 U.S. at 607-09. The FIFRA statute only permits a "State" to regulate pesticides, *see* 7 U.S.C. § 136v(a), and defines a "State" as "a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa." 7 U.S.C. § 136(aa). The *Mortier* Court held, however, that the statute's silence with regard to local governments could not be read "to establish a clear and manifest purpose to preempt local authority." *Id.* at 607 (internal quotations and citations omitted). The Court stated further:

> The principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . in [its] absolute discretion. The exclusion of political subdivisions cannot be inferred from the express authorization to the "State[s]" because political subdivisions are components of the very entity the statute empowers. Indeed, the more plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the "absolute discretion" of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities.

Id. at 607-08 (citations and some internal quotations omitted) (alterations in original). Based on the language in *Mortier*, these courts found that § 14501(c)(2)(A)'s failure to mention a political subdivision of a state did not control the preemption analysis.

The Second Circuit also relied on the interpretation given to § 14501(c)(2)(A) by the United States Department of Transportation. In a document entitled "Intrastate Trucking Deregulation: An Analysis and Interpretation of Title VI, Federal Aviation Administration Authorization Act of 1994," the Department stated:

> We believe that State or *local regulations* governing the towing of damaged or abandoned vehicles that are public safety hazards would fall within this exemption, assuming again that such regulations are not a guise for broader economic restrictions.

See Ace Auto, 171 F.3d at 775 (emphasis added) (quoting U.S. Dep't of Transp., *Intrastate Trucking Deregulation: An Analysis and Interpretation of Title VI, Federal Aviation Administration Authorization Act of 1994*, P.L. 103-305 (Mar. 1995)).

Furthermore, consistent with the decisions on this side of the debate and with the City's argument, we note that the statutory language at issue is phrased in the negative — stating that the federal statute shall *not* restrict a state from regulating the safety of motor vehicles. *See* 49 U.S.C. § 14501(c)(2)(A). As the City argues, if we were to find that the State of Texas cannot redelegate its authority to municipalities such as the City, we would, by necessity, be restricting that state's ability to regulate.[22]

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22. This argument follows from the fact that, as mentioned, Texas has specifically delegated its authority "to the extent allowed by federal law." *See* TEX. TRANSP. CODE ANN. § 643.201(a). Under (Cont'd)

Faced with this difficult task of statutory interpretation, we ultimately conclude that we must adopt a plain reading of the language and structure of § 14501(c)(2)(A). We thus join the majority of circuits in interpreting the omission of the phrase "political subdivision of a State" as Congress's "clear and manifest" intent to preempt municipal safety regulation of the towing industry. As three of our sister circuits have found, foundational principles of statutory construction guide us to presume that Congress intended the language contained within the statute. *See Petrey*, 246 F.3d at 561; *Tocher*, 219 F.3d at 1051; *Mayer*, 158 F.3d at 545-46; *see also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) ("[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." (alteration in original)). Because Congress did include the language "political subdivision of a State" in seven other provisions of the statute and did not include it in § 14501(c)(2)(A), we are unwilling to interpret the statute against its plain meaning.[23]

We also find reliance on *Mortier* misplaced. Those courts that have relied on *Mortier* to conclude that § 14501(c)(2)(A)'s statutory silence as to local governments

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Supremacy Clause principles, we interpret this delegation as being limited by the dictates of Congress's stated intent in § 14501(c)(1) and § 14501(c)(2)(A). *See* U.S. CONST. art. VI, cl. 2.

23. Further, we are guided by the definition of "State" included in 49 U.S.C. § 13102(18), which does not include a political subdivision of a state.

permits the delegation of state safety authority to municipalities have failed to recognize that the statutes at issue are quite different. FIFRA, in contrast to § 14501(c), does not contain express preemption language. More specifically, as both the *Mayer* and *Petrey* courts have recognized, "the specific FIFRA provision interpreted in *Mortier* made no reference to political subdivisions whatsoever, and FIFRA as a whole contains only scattered mention of political subdivisions in its other parts." *Petrey*, 246 F.3d at 562 (citing *Mayer*, 158 F.3d at 547) (internal quotations omitted). In contrast, § 14501 contains "seven references to political subdivisions overall, a reference to political subdivisions in the general preemption provision, and a reference to political subdivisions in one of the exceptions to the general preemption provision." *Petrey*, 246 F.3d at 562. Thus, Congress's almost complete silence throughout FIFRA concerning political subdivisions simply cannot be equated with the language of § 14501 and the particular omission in § 14501(c)(2)(A).

Finally, we agree with the Eleventh Circuit that "*Mortier* . . . falls short of establishing a rule that the word 'State' must be interpreted to include political subdivisions in all circumstances." *Mayer*, 158 F.3d at 547. Such an interpretation, we recognize, would have perverse consequences:

> [Such a] reading of the safety exception would lead to the absurd result that Congress can never preempt local regulations and simultaneously leave a state's ability to regulate intact. If this Court were to hold that a state can always delegate its responsibility to municipalities, Congress

> would always be required to preempt both state and local laws, or preempt neither. That result would violate fundamental principles of federalism and lead to a distorted interpretation of the Supremacy Clause.

Tocher, 219 F.3d at 1051. Thus, we cannot agree with those courts that have, based on *Mortier*, allowed municipalities to avoid preemption through a redelegation theory.

It is this final point that also aids us in resolving the most difficult argument presented by the City — namely, how to square the negatively phrased "shall not restrict the safety regulatory authority of a State with respect to motor vehicles" language, with the determination that states may not redelegate their safety authority over motor carriers to municipalities. As an analysis of the legislative purpose and history of § 14501(c)(2)(A) demonstrates, Congress's decision to permit regulation of certain facets of the transportation industry at the state level, but not at the local level, was a deliberate action intended to further competitive markets. We now turn to that analysis.

2. Legislative History and Purpose

As with the textual analysis, courts have differed regarding how best to interpret the legislative history of the safety exemption in § 14501(c)(2)(A). Again, the Sixth, Ninth, and Eleventh Circuits have held that the legislative history supports the argument that municipalities were not intended to benefit from the safety exemption. "The legislative purpose and history of § 14501 . . . support the notion that Congress's failure to include political

subdivisions in § 14501(c)(2)(A) was deliberate." *See Petrey*, 246 F.3d at 563; *see also Tocher*, 219 F.3d at 1051; *Mayer*, 158 F.3d at 546.

First, these courts point to the ICCTA's conference report, which expressed Congress's intent to promote greater competition:

> [T]he conferees believe preemption legislation is in the public interest as well as necessary to facilitate interstate commerce. State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets. . . . The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.

H.R. CONF. REP. NO. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759; *see also Petrey* 246 F.3d at 563; *Mayer*, 158 F.3d at 546.[24] These courts recognize that a "strict

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24. The debates in the House of Representatives support the conclusion that the inclusion of § 14501(c)(2)(C) was meant to exempt nonconsensual towing prices from preemption but leave consensual towing preempted by § 14501(c):

> The pending legislation would restore the local authority to engage in regulating the prices charged by tow trucks in nonconsensual towing situations. Regulation of routes

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reading" of § 14501(c)(2)(A) "furthers the policy of deregulation underlying the enactment of section 14501. Allowing both states and municipalities to escape preemption under the guise of regulating safety could lead to widespread, diverse regulation of motor carriers, precisely what Congress sought to avoid in promulgating a broad preemption statute." *Tocher*, 219 F.3d at 1051; *see also Mayer*, 158 F.3d at 546.

The legislative purpose, therefore, was to increase competition by eliminating overlapping and potentially inconsistent local regulations, without undermining the states' ability to regulate motor vehicle safety, highway route controls, hazardous cargo, or motor carrier insurance requirements. *See* 49 U.S.C. § 14501(c)(2)(A). "Stated differently, it is reasonable to assume that Congress decided that safety and insurance ordinances must be enacted on a statewide level, in order to minimize the disturbance to the motor transportation industry that a patchwork of local ordinances inevitably would create." *Mayer*, 158 F.3d at 546.

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> and services, *as well as regulation of consensual towing, would still be preempted.*
>
> Nonconsensual towing situations are those where the owner of the vehicle is unable to consent to it being towed, such as in cases of a severe accident, where the vehicle is towed from a commercial establishment for being illegally parked, or towed from city streets as a result of police order.

141 CONG. REC. H15,602 (daily ed. Dec. 22, 1995) (statement of Rep. Rahall) (emphasis added).

The Second Circuit, however, has interpreted the legislative history in broader terms, allowing for the delegation of state safety authority to municipalities. In evaluating the same ICCTA conference report on which Stucky and the other circuits have relied, the court stated: "[W]e see no reason to construe this language to prevent the state from delegating *its* regulatory authority to a municipality. To the contrary, the legislative history indicates that state safety regulatory authority (including, presumably, the authority to delegate) was to be 'unaffected' by the preemption statute." *Ace Auto*, 171 F.3d at 775 (quoting H.R. CONF. REP. No. 103-677, at 84, 85, *reprinted in* 1994 U.S.C.C.A.N. at 1756, 1757). The Second Circuit further stated:

> [A]lthough the legislative history clearly illustrates Congress' deregulatory purpose, the history is ambiguous as to the scope of that purpose. More particularly, the reports issued in connection with § 14501 suggest that its primary purpose was to eliminate local economic regulation, not local safety regulation. To the extent that the scope of Congress' purpose is unclear, we hesitate to construe the text of § 14501 so as to frustrate unnecessarily the ability of municipalities to respond to the local safety concerns created by local towing industries.

Ace Auto, 171 F.3d at 775 (citing H.R. CONF. REP. No. 103-677, at 86-87 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 1758-59) (internal citation omitted); *Harris County Wrecker*, 943 F. Supp. at 727 ("[T]here is no evidence or congressional findings that municipal safety regulations would interfere with Congress's concern for competitiveness in tow trucking.").

After our own review of the legislative history, we are compelled to agree with the conclusions of the Sixth, Ninth, and Eleventh Circuits. While acknowledging the closeness of the question, we hold that any ambiguity in the legislative history must be resolved consistent with our plain reading of the statute.

Primarily, our reasoning rests on three interrelated factors. First, all courts addressing this issue have recognized that § 14501(c) was enacted with a deregulatory purpose. By interpreting the legislative history consistent with the plain language of the exemptions in § 14501(c)(2)(A), we further that purpose.

Second, we find it reasonable that in mentioning only "States" in § 14501(c)(2)(A), Congress intended to permit regulation of certain components of the transportation industry at the state level and preclude those same regulations at the local level. *See Mayer*, 158 F.3d at 546 n.6 ("By requiring that safety and insurance ordinances must be enacted on a statewide basis, the costs associated with complying with the ordinances are reduced dramatically, which is an outcome that is consistent with the policy objectives of the ICCTA."). This "partial" preemption preserves state control over state interests and yet fosters deregulation by preventing a patchwork of municipal and county safety and insurance regulations from impeding the competitive development of the towing services industry.

Finally, we are unconvinced by the distinction relied on by the Second Circuit, that Congress intended to eliminate "local economic regulation," but not "local safety regulation."

Ace Auto, 171 F.3d at 775-76. While the statement of intent may be accurate, the instant case proves the fragility of the distinction, as the single-vendor system, if exempted as a "safety regulation," would result in an economically noncompetitive market for all City-authorized consent and nonconsent tows. Thus, under the guise of safety regulation, the economics of the intrastate towing market would be shifted away from the competitive market envisioned by Congress. As was recognized in oral argument, under the City's argument there is no stopping point for the potential reach of the safety exemption. Pursuant to § 14501(c)(2)(A), municipalities potentially could designate all tows in the City as implicating safety concerns and thus regulate the entire towing industry under the safety exemption. We do not believe Congress created § 14501(c)(2)(A) to be a loophole through which local governments could avoid the general preemptive reach of § 14501(c)(1).

Therefore, we hold that the City's Ordinances involving consent towing cannot escape federal preemption under the safety exemption of § 14501(c)(2)(A). The plain reading of the statute, supported by its legislative history, demonstrates Congress's clear and manifest intent not to include political subdivisions of the state within that exemption.

V. CONCLUSION

For the foregoing reasons, we REVERSE the judgment of the district court and REMAND for proceedings consistent with this opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION, DATED APRIL 3, 2000 AND FILED APRIL 4, 2000

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-96-CA-1285-EP

BRENDA L. STUCKY d/b/a BILL'S WRECKER SERVICES and RICHARD VILLANUEVA d/b/a CRESWELL'S 24-HR. WRECKER SERVICE,

Plaintiffs,

VS.

CITY OF SAN ANTONIO,

Defendant.

ORDER

On this date the Court considered the parties' renewed motions for summary judgment, filed at this Court's request in light of a recent Fifth Circuit ruling on this matter. After careful consideration, the Court will issue the following Order finding that the City of San Antonio may (1) prohibit a disabled vehicle operator from requesting tow services other than those provided by a company with which the City has contracted; (2) prohibit the Plaintiffs from offering their towing services on City streets where the City has taken

control of the situation; and (3) prohibit the Plaintiffs from towing disabled vehicles from the scene of a collision, whether or not the vehicle operator is able to select a towing company.

Procedural History

Plaintiffs filed this lawsuit against Defendant City of San Antonio, seeking a declaration that the City of San Antonio's Wrecker Code section 19-391(a) and City Ordinance 77716 are preempted by 49 U.S.C. section 14501(c) to the extent that they prevent the Plaintiffs from competing for jobs involving towing, removing, or hauling vehicles from City public streets. Plaintiffs also brought 42 U.S.C. section 1983 and antitrust claims. Texas Towing Corporation intervened in the suit, arguing, with the City, that the City's scheme was not preempted and did not violate civil rights law or antitrust law.

On August 25, 1998, this Court entered an Order granting partial summary judgment to the Plaintiffs on the issue of whether federal law preempted the City's towing scheme and enjoining the City from continued operation under the scheme. In addition, the Court granted summary judgment in favor of the City and Intervenor on the Plaintiffs' civil rights claim and on a claim for *money damages* arising from violations of antitrust law. The Court denied summary judgment on the Plaintiffs' request for *injunctive* relief based on antitrust violations.

The parties jointly requested that the Court sever and render judgment on the preemption question and certify the

question for interlocutory appeal, so that the parties could take the issue to the United States Court of Appeals for the Fifth Circuit. By orders and a judgment issued September 21, 1998, and October 13, 1998, respectively, the Court granted the requests. On appeal, however, the Fifth Circuit found that the Court's unjustified certification for interlocutory appeal was insufficient. *See Stucky v. City of San Antonio*, No. 98-50934, at 3 n.2 (finding insufficient basis for interlocutory appeal) and at 4 n.4 (suggesting it has no jurisdiction over certified matters by noting that it "also" has no jurisdiction over denial of summary judgment) (5th Cir. January 14, 2000). That court vacated this Court's improperly certified rulings, apparently on their merits, and ordered that this Court reconsider its conclusions in light of the Fifth Circuit's 1999 decision in *Cardinal Towing and Auto Repair, Inc. v. City of Bedford, Texas*, 180 F.3d 686.

Accordingly, this Court ordered the parties to address the merits of the preemption issue in light of *Cardinal Towing*. That issue (specifically as it relates to "consent" tows) is, for the present, the only issue before the Court.

Cardinal Towing

The holding in *Cardinal Towing* significantly limits this Court's renewed consideration of the preemption issue. In that case, the Fifth Circuit expressly found it "unnecessary to address the application of [exemptions] to the federal law at issue because it concluded that "the City's actions were proprietary and did not constitute the type of regulation covered in the statute's preemption clause." *Cardinal Towing*, 180 F.3d at 690. The limited question in *Cardinal Towing*,

then, was whether a city's decision to contract with a single towing operator was proprietary or whether it was regulatory and thus subject to preemption by federal law prohibiting states from regulating the price, route, or service of a motor carrier with respect to the transportation of property. *See* 49 U.S.C. § 14501(c)(1).

In light of the relatively limited scope of *Cardinal Towing*, this Court sees no reason to revisit its views regarding whether the City's scheme is generally preempted by federal statute and whether any such preemption is saved by statutory exemption or exception. Rather, the Court will focus its attention on whether the City's actions are regulatory or proprietary. *See Cardinal Towing*, 180 F.3d at 690. In other words, the Court will examine the evidence presented to determine whether the City intended to regulate its towing industry and is thus subject to the preemption doctrine or whether it desired only "to procure services that [it] itself needed" and may thus proceed as a private consumer in the marketplace. *Id.* at 691.

In determining whether an action is proprietary or regulatory, the Court focuses on two inquiries. *Id.* at 693. First, the Court must determine whether the challenged action reflect the City's own interest in the efficient procurement of necessary goods and services, as "measured by comparison with the typical behavior of private parties in similar circumstances." *Id.* Second, the Court must determine whether the narrow scope of the challenged action defeats an inference that its foremost objective was to regulate an industry rather than address its own specific proprietary problem. *Id.*

Appendix B

In *Cardinal Towing*, the Court considered the ordinance and towing contract specifications of Bedford City, Texas. Bedford City, like San Antonio, had opted to move to a system whereby it hired a single company to handle its non-consent tows. The City solicited bids, asking applicants to comply with several requirements, including a guarantee of response time within fifteen minutes and access to a wrecker large enough to remove tractor trailer trucks. The City settled on a company, and Cardinal Towing then filed suit, alleging preemption and race discrimination.

The Fifth Circuit held that the City's actions had an "obvious connection" to its narrow proprietary interest in procuring services. *Id.* at 693. In reaching this conclusion, the court noted that the system clarified responsibility, minimized administrative confusion, and allowed for the setting and easy supervision of a unitary quality standard for City tows. *Id.* The Court said that the specifications laid out by the City in the bidding process evinced the City's core, proprietary concerns of efficiency and reliability. *Id.*

Next, the court stated that the scope of the City's ordinance and contractual specifications were sufficiently narrow to reflect purely proprietary concerns. *Id.* at 694. The Court noted that the single-tow system came into play only where the owner of the disabled vehicle was unwilling or unable to specify a towing company. *Id.* In addition, the Court noted that the City's contract specifications pertained only to the bidder's work for the City, not to its other contracts, and only to City contracts for police tows, not to other City contracts. "Taken together," the Court stated, "the limited scope here decisively forecloses an inference that the City

sought to change the tow truck industry as a whole, let alone influence the City at large." *Id.*

Plaintiffs point to a factual difference between this case and *Cardinal Towing* that, according to the Plaintiffs, mandate a different result in this case. The Plaintiffs note that in *Cardinal Towing,* the ordinances and specifications at issue dealt only with non-consent tows. In fact, the Fifth Circuit itself expressly noted this distinction: "The ordinance did not affect non-consensual tows requested by private property owners-property owners remain free to strike agreements with any towing company they wish, *nor did it affect situations in which the owner of a disabled car was available and expressed a preference for a particular company at the scene of the accident.*" *Cardinal Towing & Auto Repair,* 180 F.3d at 689 (emphasis added).

The City's response that it had, by ordinance, defined *all* City tows as nonconsensual is problematic. In the first place, the State of Texas has defined consent and non-consent tows by statute. *See* TEX. TRANS. CODE § 643.201(e) (defining "consent tow" as a tow made with the consent of the owner or operator and "non-consent" tow as a tow made without the consent of the owner or operator of the vehicle"). In the second place, the City cannot, by sleight of hand (or language) simply eliminate the concerns addressed by the inquiry regarding whether a tow is consensual or nonconsensual. In taking up that question, the Fifth Circuit was attempting to determine whether the City of Bedford's ordinance and contractual specifications "called into question the proprietary character of the City's actions." *Cardinal Towing,* 180 F.3d at 694. It cannot be the case that simply redefining what a

consent tow is eliminates that concern. Therefore, the City's case, as the Intervenor implicitly acknowledges, must rise or fall on the assumption that its ordinances pertain to both consent and nonconsent tows, as such tows are defined by state statute.

The Court has considered this question carefully. In asking this Court to review its previous rulings in light of *Cardinal Towing*, the Fifth Circuit gave no indication of how it felt that case should be applied to these facts. The Court must admit that it has some reservations regarding whether the consent/nonconsent distinction is dispositive. In ultimately concluding that the Fifth Circuit did not mean it to be so, the Court has attempted to focus on what it believes is the ultimate concern, as delineated in *Cardinal Towing*, which is whether the scope of the ordinances here "decisively foreclose an inference that the City sought to change the tow truck industry as a whole, let alone influence society at large." *Id.* at 694. The Court must conclude that such an inference is foreclosed.

The City ordinances deal exclusively with City-directed tows; there is no effort by the City evidenced in the record to affect the conditions under which tow operators conduct their business otherwise. The City's policies do not reach the general towing industry or the availability of wreckers, the proper equipment, or response time required outside City-directed tows. While the City's scheme does include consent tows, the City has argued that the inclusion narrowly addresses its proprietary concerns — the swift and efficient removal of disabled vehicles from City streets. The City argues that, given the large size of the City, permitting

non-incapacitated individuals to call their own tow companies would inevitably increase the time necessary to clear the streets, because it will take longer for tow operators to reach the site of the accident than it might in a smaller town or city. The Court cannot say that these concerns are not legitimate and certainly cannot say that they mask a desire on the part of the City to regulate its private towing companies.

Thus, the Court concludes that the City of San Antonio is not regulating an industry but is instead addressing its own proprietary interests in the efficient and swift removal of disabled vehicles from City streets. Therefore, the City's ordinances are not preempted. As the Court understands the present posture of this matter, this resolution leaves one issue remaining-the question of whether the Plaintiffs are entitled to injunctive relief based on alleged federal antitrust violations. While the City addressed that claim in its motion for summary judgment, the Plaintiffs did not do so (nor were they required to do so by this Court's order for briefing). Therefore, the Court will Order that the Plaintiffs respond to the City's arguments on the issue within fourteen days from the date of this Order or notify the Court they do not intend to pursue the claim.

ACCORDINGLY, it is ORDERED that the Defendant's and Intervenor's motions for summary judgment (Docket Nos. 78 and 79) are GRANTED, IN PART, such that Plaintiffs' claims regarding whether the City's scheme of contracting with a single towing company for the purpose of removing disabled vehicles from City streets are DISMISSED. The motions are DENIED, IN PART, to the

extent that they raise the question of whether Plaintiffs are entitled to injunctive relief for alleged antitrust violations. It is further ORDERED that Plaintiffs' motion for partial summary judgment (Docket No. 81) is DENIED. It is finally ORDERED that, within fourteen days of the date of this Order, Plaintiffs shall respond to Defendant's arguments regarding the antitrust claim or shall notify the Court that they no longer intend to pursue that claim.

SIGNED and ENTERED this 3rd day of April, 2000.

s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT
JUDGE

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION, DATED MAY 3, 2000 AND FILED MAY 4, 2000

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-96-CA-1285-EP

BRENDA L. STUCKY d/b/a BILL'S WRECKER SERVICES and RICHARD VILLANUEVA d/b/a CRESWELL'S 24-HR. WRECKER SERVICE,

Plaintiffs,

VS.

CITY OF SAN ANTONIO,

Defendant.

JUDGMENT

In accordance with this Court's order of April 4, 2000, and with the Plaintiffs' notice to the Court that they did not wish to pursue their remaining claims against the Defendant City of San Antonio, it is hereby ORDERED, ADJUDGED, and DECREED that judgment is GRANTED in favor of the Defendant and against the Plaintiffs.

Appendix C

SIGNED and ENTERED this 3rd day of May, 2000.

s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT
JUDGE

APPENDIX D — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION, DATED MAY 17, 2000 AND FILED MAY 23, 2000

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-96-CA-1285-EP

BRENDA L. STUCKY d/b/a BILL'S WRECKER SERVICES and RICHARD VILLANUEVA d/b/a CRESWELL'S 24-HR. WRECKER SERVICE,

Plaintiffs,

VS.

CITY OF SAN ANTONIO,

Defendant.

AMENDED JUDGMENT

In accordance with this Court's Order of April 4, 2000, and with the Plaintiffs' notice to the Court that they did not wish to pursue their remaining claims against the Defendant City of San Antonio, it is hereby ORDERED, ADJUDGED, and DECREED that judgment is GRANTED in favor of the Defendant City of San Antonio and the Intervenor, Texas Towing Corporation, and against the Plaintiffs.

Appendix D

SIGNED and ENTERED this 17th day of May, 2000.

s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT
JUDGE

APPENDIX E — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED SEPTEMBER 14, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50462

BRENDA L STUCKY, doing business as Bill's Wrecker Service; RICHARD VILLANEVA, doing business as Creswells 24 Hour Wrecker Service

Plaintiffs – Counter Defendants – Appellants

v.

CITY OF SAN ANTONIO;

Defendant – Counter Plaintiff – Appellee

TEXAS TOWING CORPORATION

Intervenor Defendant – Counter Plaintiff – Appellee

Appeal from the United States District Court for the Western District of Texas, San Antonio

ON PETITIONS FOR REHEARING AND REHEARING EN BANC
(Opinion 7/30/01, 5th Cir., 2001 WL 863500)

Appendix E

Before KING, Chief Judge, and REAVLEY and JONES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petitions for Rehearing En Banc are also DENIED.

In its Petition for Rehearing En Banc the City of San Antonio brings to our attention a recent amendment by the Texas legislature of definitions of "consent" and "non-consent" tows. *See* TEX. TRANS[P]. CODE § 643.201(e), as amended effective Sept. 1, 2001. The City contends that based on those subsequent amendments, the court must now reconsider its rejection of the City's prior argument (outlined in footnote 11 of our opinion) that accident tows at which a police or municipal officer is present with some authority over the scene constitute "non-consent tows". The City claims that because its prior argument is newly reflected in the amended statutory definitions, the court is bound to rely on the new statute and thus to change its ruling rejecting that argument.

A careful reading of the reasons set out in footnote 11 and of our analysis of the inapplicability of the municipal proprietor exception makes clear that our ruling regarding what constitutes "consent" and "non-consent" tows for the purposes of the municipal proprietor exception was based on an in-depth substantive analysis of the actual workings

of accident tows in San Antonio and of th effect of the City's Ordinances on that market. *See Stucky*, 2001 WL 863500, at *6-11, *19 n.11. Moreover, within footnote 11 itself, the court cautioned the City that it could not simply avoid preemption with mere semantics regarding "consent" and "non-consent" tows. We reiterated the district court's admonishment of the same argument: " '[The City] cannot, by sleight of hand (or language), simply eliminate the concerns addressed by the inquiry regarding whether a tow is consensual or nonconsensual . . . . It cannot be the case that simply redefining what a consent tow is eliminates that concern.' . . . [The City's] argument is unpersuasive." *Id.* The new statutory definitions add nothing to the City's failed argument that the mere presence of a city officer makes for a non-consent tow.

The mandate shall issue forthwith.

APPENDIX F — CITY ORDINANCE 31977

AN ORDINANCE 31977

PROHIBITING AUTOMOBILE WRECKERS FROM REMOVING CERTAIN VEHICLES FROM PUBLIC STREETS AND WAYS IN THE CITY OF SAN ANTONIO AND PROVIDING FOR A FINE NOT TO EXCEED $200.00 FOR VIOLATION OF SUCH PROHIBITION.

WHEREAS, under the provisions of Article 1175 of the Revised Civil Statutes of the State of Texas, the City of San Antonio is given dominion, control and jurisdiction in, over and under the public streets, avenues, alleys, highways, boulevards and public roads within said City, and

WHEREAS, under the provisions of the Charter of the City of San Antonio, particularly Paragraph 13 of Section 3, there is a duty incumbent on the City to suppress, abate and prohibit all things or acts detrimental to the health, comfort, safety and convenience of the inhabitants of said City, and

WHEREAS, the City of San Antonio is the guardian of the public rights in the public streets, ways and public property within said City and holds title for the benefit of the public, and

WHEREAS, past experience indicates that automobile wreckers frequently race to the scene of automobile accidents in the hope of securing the business of towing in disabled motor vehicles for repairs, and

Appendix F

WHEREAS, in proceeding to the scene of such accidents the drivers of such automobile wreckers often violate traffic and speed regulations designed to protect the general public, and

WHEREAS, upon arrival at the scene of such accidents the drivers of such automobile wreckers often engage in the soliciting of the business of towing, removing, repairing, wrecking, storing, or purchasing wrecked or disabled vehicles at or near the scene of said wrecks or on the streets or sidewalks of said City and occasionally encounter lively competition in securing possession of the disabled vehicles resulting in breaches of the peace by and among the several automobile wreckers, and

WHEREAS, upon arrival at the scene of such accidents the drivers of such automobile wreckers frequently interfere with and impede the investigation of the accident by the police as well as the medical treatment of the persons involved in such accident, and

WHEREAS, the efforts of the City police to control the aforementioned practices of automobile wrecker operators have not been successful, and

WHEREAS, the aforementioned practices of automobile wrecker operators offend against the public peace, safety and welfare of the City of San Antonio and require regulations and control, and

WHEREAS, in order to prevent confusion and traffic congestion which endanger public health, safety and property

of the City of San Antonio it is deemed expedient, desirable and necessary to adopt regulations controlling the operation of automobile wreckers upon the public streets and ways of the City of San Antonio; NOW, THEREFORE:

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

1. It shall be unlawful for any person, in the operation of an automobile wrecker on the public streets and ways of the City of San Antonio, and not having been directed to do so by the Chief of Police of the City of San Antonio or his authorized representative, knowingly to move, tow, haul or otherwise transport in, on or over the public streets and ways of the City of San Antonio any vehicle which has been abandoned or which has been involved in a collision.

2. Any person violating the provisions of this ordinance shall be deemed guilty of a misdemeanor and shall upon conviction be punished by a fine not exceeding $200.00.

3. PASSED AND APPROVED this 12th day of December, 1963.

s/ W. McAllister
MAYOR

ATTEST: s/ [illegible]
City Clerk

APPROVED AS TO FORM: s/ Sam S. Wolf
Acting City Attorney

APPENDIX G — CITY WRECKER CODE, § 19-391

Sec. 19-391. Removing wrecked or abandoned vehicles on public streets, ways, or other public property.

(a) It shall be unlawful for any person, in the operation of an automobile wrecker on the public streets and ways of the city and not having been directed to do so by the chief of police, the parking manager of the public works department or authorized representatives, knowingly to move, tow, haul or otherwise transport in, on or over the public streets and ways of the city any vehicle which has been abandoned or which has been involved in collision and is on a public street, way or other public property.

(b) On city parking lots or facilities, if a motor vehicle is blocking an entrance, exit, fire lane, or parked in other than a marked parking space so as to prevent other motor vehicles from exiting from such lot or facility, the city parking manager and duly authorized representatives are authorized to have such vehicle relocated to another location on the lot or facility, and charge the vehicle owner for the expense to the city in having a towing company relocate the vehicle; provided, however, that this authority is in addition to all other rights and remedies available to parking facility owners or their representatives in such cases. Vehicles not authorized to park at city parking facilities or lots shall be removed to the police department vehicle storage facility or other duly authorized locations at the direction of the parking manager and duly authorized representatives.

Appendix G

(c) Other motor vehicles on public streets, ways or public property may be removed only with the express consent of the owner or operator, or at the direction of the chief of police, his designated representative, or the parking manager of the public works department and duly authorized representatives.

* * * *

APPENDIX H — CITY ORDINANCE 77716 (WITH CONTRACT)

AN ORDINANCE 77716

ACCEPTING THE WRECKER SERVICE CONTRACT PROPOSAL AND AUTHORIZING THE CITY MANAGER TO EXECUTE A CONTRACT WITH SAID FIRM WHICH INCORPORATES THE TERMS, REQUIREMENTS, AND PROVISIONS OF THE CITY'S REQUEST FOR PROPOSALS AND THE SUBJECT PROPOSAL.
(TEXAS TOWING CORP.)

WHEREAS, the City formally requested proposals from all interested wrecker service businesses to provide vehicle towing services to the Police Department for a period of up to five (5) years; and

WHEREAS, four proposals were submitted and evaluated on such qualities as financial stability, equipment inventory and/or acquisition plan, management experience, wrecker service field experience, contingency plan for severe weather, a rotation plan, driver safety plan, driver training program, insurance plan, availability of, or plan for, a downtown storage facility, nature and success of past business operations, minority participation plan, and towing rate quotations; and

WHEREAS, staff members with various relevant backgrounds were selected to evaluate the various aspects of each contractor's proposal, and based on each proposal, determined the likely performance of each contractor as the prime contractor; and

Appendix H

WHEREAS, at the Council meeting of April 1, 1993, the Council conducted interviews of the proposers, NOW THEREFORE

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

The City Manager is hereby authorized to execute a contract for wrecker towing services with the firm of

TEXAS TOWING CORP.

which incorporates the terms and conditions of the City Request for Proposal and the responsive proposal provisions submitted to the City. All other proposals are hereby rejected.

PASSED AND APPROVED THIS 1st day of April, 1993.

s/ Juan F. Solis III
MAYOR PRO TEM

ATTEST: s/ Norma S. Rodriguez
City Clerk

APPROVED AS TO FORM: s/ Tom Finlay for
City Attorney

Appendix H

ATTACHMENT

CONTRACT BETWEEN CITY OF SAN ANTONIO AND TEXAS TOWING CORPORATION DATED MAY 10, 1993

[Omitted here but submitted separately as Lodging]

APPENDIX I — CITY ORDINANCE 82744

AN ORDINANCE **82744**

AUTHORIZING THE EXECUTION OF AN AMENDMENT TO THE CONTRACT WITH TEXAS TOWING CORPORATION ENTERED INTO ON MAY 28, 1993, TO PROVIDE FOR A FIVE-YEAR EXTENSION OPTION.

WHEREAS, the City of San Antonio and Texas Towing Corporation entered into a contract on May 10, 1993, which provided that Texas Towing Corporation would provide wrecker services to the City of San Antonio; and

WHEREAS, said contract was authorized by the City Council of the City of San Antonio by way of Ordinance No. 77716, passed and approved on April 1, 1993; and

WHEREAS, the parties wish to amend said contract to provide the City an option to extend the contract for an additional five years; **NOW THEREFORE**:

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. The City Manager, or his designee, is hereby authorized to execute an amendment to the contract with Texas Towing Corporation entered into on May 10, 1993, pursuant to Ordinance No. 77716, passed and approved on April 1, 1993, said amendment providing the City an option to extend the contract for an additional five years upon City Council authorization. A copy of said amendment is attached hereto and incorporated herein as Attachment I.

Appendix I

SECTION 2. This ordinance shall take effect ten days from the date of passage.

PASSED AND APPROVED THIS 31st day of August, 1995.

s/ Henry Avila
MAYOR PRO TEM

ATTEST:

s/ Norma S. Rodriguez
City Clerk

APPROVED AS TO FORM: s/ Tom Finlay for
City Attorney

APPENDIX J — CITY ORDINANCE 87775

AN ORDINANCE **87775**

EXERCISING THE OPTION TO EXTEND THE SAN ANTONIO WRECKER SERVICE CONTRACT, ENTERED INTO ON MAY 28, 1993, AND AMENDED ON AUGUST 31, 1995, BY ORDINANCE NO. 82744, WITH TEXAS TOWING CORPORATION FOR A PERIOD OF FIVE YEARS; AND TO PROVIDE FOR AMENDMENT OF THAT CONTRACT.

WHEREAS, the city of San Antonio is the guardian of the public rights in the public streets, ways and public property within said city and holds title for the benefit of the public; and

WHEREAS, experience indicates that public safety is endangered by wreckers racing to the scenes of vehicle collisions to compete for business, by congestion of public streets and ways by multiple wreckers arriving at the scene, creating hazards of additional accidents and impassable streets for emergency vehicles, by requiring excess police manpower to protect scenes of collisions due to delay in arrival of appropriate towing equipment, and by towing services not providing adequate and safe towing equipment for removal of automobiles, it is in the best interest of public safety to regulate automobile wreckers in responding to automobile accidents and abandoned vehicles or other police incidents; and

WHEREAS, in 1963, the San Antonio City Council passed Ordinance No. 31977, later codified in the San Antonio City Code as Section 19-391, placing authority for towing from public streets and ways any vehicles abandoned or involved

in a collision in the chief of police, or his authorized representative; and

WHEREAS, experience has shown that the interests of public safety are best met through the implementation of a single contract towing system, allowing for subcontract on a rotational basis of 50% of towing to other towing entities meeting the basic safety requirements set forth by the city, including insurance and equipment requirements; and

WHEREAS, the financial investment necessary to operate under the safety and equipment requirements is substantial, requiring a contract term of at least five years; and

WHEREAS, on or about April 1, 1993, the San Antonio City Council passed Ordinance No. 77716, authorizing the execution of a contract for wrecker towing services with Texas Towing Corporation and said contract was entered into for an initial period of one year with an automatic four-year extension upon successful performance in the first year; and

WHEREAS, on or about August 31, 1995, the San Antonio City Council passed Ordinance No. 82744, authorizing the amendment of that contract to provide the council with an option to extend the contract for an additional five-year term beyond the original termination date of May 28, 1998; and

WHEREAS, city staff has reviewed the performance of Texas Towing Corporation and found that its performance in public safety, public satisfaction and administrative duties has exceeded expectations over the last five years; and

Appendix J

WHEREAS, it appears that extending the contract, with certain amendments, is in the best interest of the public safety; **NOW THEREFORE**:

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. The City Manager, or his designated representative, is hereby authorized to execute an amendment to the contract with Texas Towing Corporation entered into on May 10, 1993, pursuant to Ordinance No. 77716, passed and approved on April 1, 1993, and amended pursuant to Ordinance No. 82744, passed and approved on August 31, 1995, said amendment, among other things, exercising the city's option to extend the contract for an additional five years. A copy of said amendment is attached hereto and incorporated herein for all purposes as Attachment I.

SECTION 2. This ordinance shall take effect ten days from the date of passage.

PASSED AND APPROVED THIS 7th day of May, 1998.

s/ Howard W. Peak
MAYOR
Howard W. Peak

ATTEST:

s/ Norma S. Rodriguez
City Clerk

APPROVED AS TO FORM: s/ F.J. Garza
City Attorney

Supreme Court, U.S.
FILED
APR 8 2002
CLERK

No. 01-1028

In The

Supreme Court of the United States

CITY OF SAN ANTONIO and
TEXAS TOWING CORPORATION,

Petitioners,

v.

BRENDA L. STUCKY, d/b/a Bill's Wrecker Service, and RICHARD VILLANEVA, d/b/a Creswell's 24 Hour Wrecker Service,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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LIST OF PARTIES

The only parties to this proceeding are listed in the caption. Pursuant to Supreme Court Rule 29.1, the Court is advised that Respondents have no parent companies or subsidiaries that are not wholly owned.

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BRIEF IN OPPOSITION

Respondents respectfully submit this brief in opposition to the petition for a writ of certiorari in this case. The Petitioners' preemption and related delegation issues are currently before the Court. The remainder of the petition presents no legal issues of general importance beyond the facts of this particular case or that otherwise would merit the Court's plenary review.

BACKGROUND

Respondents, Brenda L. Stucky, d/b/a Bill's Wrecker Service, and Richard Villaneva, d/b/a Creswell's 24 Hour Wrecker Service, are tow truck operators whose principal places of business are located within the municipal boundaries of the City of San Antonio.

The City of San Antonio through City Code § 19-391(a) and related enabling ordinance(s) has enacted a single vendor contract towing system for the towing of any vehicle involved in a collision on a public street.[1]

[1] San Antonio City Code, § 19-391(a):

(a) It shall be unlawful for any person, in the operation of an automobile wrecker on the public streets and ways of the city and not having been directed to do so by the chief of police, the parking manager of the public works department or authorized representatives, knowingly to move, tow, haul or otherwise transport in, on or over the public streets and ways of the city any vehicle which has been abandoned or which has been involved in

Under this system only the City's contracted towing service, currently Petitioner Texas Towing Corporation, is allowed to tow a vehicle from a collision scene. No consideration is given by the City to the desires of the disabled vehicle operator at the scene of the collision. "[A] person involved in a collision is not permitted to call the towing service of his choice but must, despite his protest, engage the services of the wrecker service with whom the City (San Antonio) has a current contract." *Andrada v. City of San Antonio*, 555 S.W. 2d 488, 490 (Tex.Civ.App.– San Antonio 1977, *writ dism'd*). Disabled vehicle operators are prohibited from employing a tow truck service that may offer a better rate or a towing service through their enrollment in a motor club, the American Automobile Association, or a dealership service contract. Violation of City Code § 19-391(a) can result in criminal penalty and termination of the violator's City issued motor vehicle tow service license.[2] The effect of the single vendor contract system is an absolute bar to Respondents, and any towing tow truck operator, other

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collision and is on a public street, way or other public property.

The current "Wrecker Service Contract" with petitioner Texas Towing Corporation was adopted under City Ordinance No. 87775. (City Ordinance No. 77716, at the time of the filing of the Plaintiffs' Original Complaint).

[2] Sec. 19-392. Penalties for violations.

Conviction of any provision of this chapter shall be punished in accordance with section 1-5. Said criminal penalties shall be cumulative of any other rights held by the city on behalf of the public; namely, the power to terminate a motor vehicle tow service license.

than the contract towing service, from participation in the collision towing market in San Antonio, Texas.

Respondents asserted in the lower courts that the City's single vendor contract system, to the extent it regulates those collision instances where the disabled vehicle operator was present at the scene and willing and able to select a towing service, (defined by Respondents as a "consent tow"), was preempted by the Federal Aviation Administration Authorization Act of 1994, now codified as 49 U.S.C. § 14501(c)(1). Respondents concede in those instances where the vehicle operator/owner is not present or able to select a towing service, due to injury or arrest, or the vehicle is abandoned, illegally parked, or taken into police custody, (defined by Respondents as a "nonconsent tow"), the City's single vendor contract system is not subject to preemption, under the municipal-proprietor/market-participant doctrine.

In response, Petitioners, both in the lower courts and in their petition, raise two issues. First, the single vendor contract system having been enacted for safety reasons, falls within the safety exception to preemption of 49 U.S.C. § 14501(c)(2)(A). Second, the City's actions, contracting for towing services, are proprietary in nature, regardless of whether the tow is consensual or nonconsensual, thus not subject to preemption, pursuant to the municipal-proprietor/market-participant doctrine.

The Fifth Circuit, based upon the general language of 49 U.S.C. § 14501(c)(1), and its legislative history, reject Petitioners' claim of safety authority under section (c)(2)(A), with respect to consensual towing from a collision. *Stucky v. City of San Antonio*, 260 F.3d 424, 439-446

(5th Cir.), *reh'g denied*, 266 F.3d 342 (5th Cir. 2001). The *Stucky* court also rejected Petitioners' claim that its single vendor towing system, as applied to collision consensual towing was propriety in nature. *Id.* at 434-439. With this backdrop Petitioners seek certiorari.

REASONS FOR DENYING THE WRIT

I. THE ISSUE OF THE STATE'S AUTHORITY TO DELEGATE ITS SAFETY TO POLITICAL SUBDIVISION IS CURRENTLY BEFORE THE COURT.

The issue raised by Petitioners in their first question presented and corresponding argument, whether the Federal Aviation Administrative Authorization Act, 49 U.S.C. § 14501(c)(1), preempts a state from delegating its safety authority contained in 49 U.S.C. § 14501(c)(2)(A) to municipalities, is currently before this Court in *City of Columbus v. Ours Garage & Wrecker Service*, 257 F.3d 506 (6th Cir. 2001), *petition for cert. granted*, U.S. No. 01-419. While the challenged municipal tow truck regulatory schemes differ factually, in the case at hand, respondent tow truck operators challenged the City of San Antonio's use of a single vender towing contract regulating all consensual towing from the scene of a vehicle collision. In *Ours Garage*, the respondent tow truck operators challenged the City of Columbus's general tow truck licensing code provisions, the fundamental disputed legal issue is the same – the state's authority to delegate its safety authority provided in 49 U.S.C. § 14501(c)(2)(A), in light of § 14501(c)'s general preemptive language. As this issue

will be resolved by this Court in the *Ours Garage* case, certiorari in this case on this point is not warranted.

II. THE REMAINING ISSUES IN THIS CASE, APPLICATION OF THE MUNICIPAL-PROPRIETOR/MARKET-PARTICIPANT DOCTRINE, AND THE CONSENT-NONCONSENT DISTINCTION, ARE NOT WORTHY OF REVIEW.

A. The Petitioners' Claim That The *Stucky* Decision Is Inconsistent With *Boston Harbor* Is No More Than A Dispute As To The Facts Applied.

The Petitioners' complaint, that the Fifth Circuit in *Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001), reached the wrong conclusion based on this Court's holding in *Building and Construction Trades Council v. Associate Builders and Contractors of Massachusetts/ Rhode Island, Inc.*, 507 U.S. 218 (1993) (*"Boston Harbor"*), is nothing more than a request to correct perceived error and is not worthy of review by this Court. Petitioners do not contend that the *Stucky* decision directly conflicts with or abrogates the two-apart analysis set forth in *Boston Harbor*. Nor, do Petitioners cite any case in direct conflict with the holding in *Stucky*. In fact, every circuit court that has addressed the issue of preemption under 49 U.S.C. § 14501(c)(1), as applied to city nonconsensual towing, have all reached the same conclusion, nonconsensual towing is exempted from preemption pursuant to the municipal-proprietor/market-participant doctrine. *See, e.g., Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 691-95 (5th Cir. 1999), relying on *Boston Harbor; Petrey v. City of Toledo*, 246 F.3d 548, 555-59 (6th Cir. 2001), citing *Cardinal Towing; Tocher v. City of Santa*

Ana, 219 F.3d 1040, 1048-50 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1085 (2001), also citing *Cardinal Towing*. Instead, Petitioners assert that the Fifth Circuit reliance on which party, the disabled vehicle driver or the city, was the consumer of the towing service was incorrect under *Boston Harbor*.

In *Cardinal Towing*, relying on *Boston Harbor*, the Fifth Circuit set forth a two-part test to determine whether the city's actions constitute market regulation or market participation (the municipal-proprietor/market-participant doctrine): (1) does the challenged action reflect the city's own interest in the efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances; and (2) do the narrow scope of the actions defeat an inference that the primary goal was to encourage a general policy rather than a specific proprietary problem? *Cardinal Towing*, 180 F.3d at 693. Irrespective of whether the *Stucky* court reached the right conclusion, it cannot be said that the Fifth Circuit, after careful analysis, was without a factual basis to conclude that the City's actions, the classification of all collision tows as nonconsent, were not typical of private parties in similar circumstances, and did not defeat an inference that the City's primary goal was to encourage a general policy, that of prohibiting wreck chasing.[3] Petitioners argue the Fifth Circuit

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[3] There was ample evidence that the City's primary goal for establishment of the single vendor contract system was that of public safety; "Affidavits from the Chief of Police, the Police Captain in charge of vehicle storage, and the Deputy Chief of Police of the Support Services Division, in charge of overseeing the Vehicle Storage Unit, all support the understanding that the

incorrectly focused on the factual definitional distinction between consent and nonconsent in determining whether the disabled vehicle operator or the city was the consumer of the towing service at the scene of a vehicle collision for purposes of application of the municipal-proprietor/market-participant doctrine.[4] However, this factual distinction is critical because it defines who the market actors are.[5] As the *Stucky* court stated:

> "[I]n the consent tow situation, unlike the nonconsent tow situation, there are two competing market actors attempting to purchase services.

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reason the City chose to regulate towing and selected a single-vendor system was to improve public safety. In both the City's and Texas Towing's briefs and at oral argument, the parties agreed that safety was the primary consideration behind the passage and continued enforcement of the Ordinances." *Stucky*, 260 F.3d at 438 (footnotes omitted).

[4] Petitioners contented that City's actions are akin to any other private property owner contracting to have vehicles towed from the property owner's land. To accept this comparison is to accept the ridiculous conclusion the only time a vehicle owner can select a towing service of his choosing is if the vehicle happens to be involved in a collision on the vehicles owner's own property. Under petitioners' theory a private property owner has the unfettered right to select the towing service and the terms the disabled vehicle owner must accept, despite the fact the vehicle owner is standing there, ready, willing, and able to have the vehicle towed.

[5] The *Stucky* court recognized that this consent-nonconsent market distinction was critical to the court's holding in *Cardinal Towing*. Noting that had the distinction not been critical "the (*Cardinal Towing*) court simply could have stated that all City tows purchased by the City on public property were proprietary and, thus, exempt from § 14501(c)(1) preemption" *Stucky*, 260 F.3d at 436.

Each market actor may wish to obtain towing services "in keeping with the ordinary behavior of private parties." *Cardinal Towing*, 180 F.3d at 693. The challenged Ordinances, however, frustrate the normal working of private decision making in a market. Under the Ordinances, if a private party wishes to employ the services of Towing Company "A" and the City wishes to employ the services of Towing Company "B", the City's choice controls. This is so, not because the City needs to purchase the service for its own proprietary interest (i.e., "to serve the government's own [towing] needs"), but for the related safety interests of "society as a whole" (i.e., controlling public streets and easing traffic congestion). *See id.* at 691. Thus, if we are to compare the City's actions to the "typical behavior of private parties," as *Cardinal Towing* instructs us to do, the conflict is readily apparent. In the consent tow situation, by countermanding a private party's choice of towing company, the City is acting at cross purposes with the private party's market decision.

Furthermore, the City's market power cannot be said to be typical of similar private actors. In utilizing its police power to control a significant portion of the towing industry, the City's actions have the direct economic effect of contracting the market. This effect does not speak to a private proprietary purchase, but rather to a public regulatory plan. *See Tocher*, 219 F.3d at 1049 ("In analyzing the [municipal-proprietor] exception, it is vital to examine the substance of the transaction because a city may not use the guise of privity of contract to conduct

otherwise forbidden regulatory activity." (citations and internal quotations omitted))." *Stucky*, 260 F.3d at 436.

Petitioners cannot defeat the fact that at its core the City's single vendor contract system, as applied to consensual towing at the scene of a collision, regulates what towing services Respondents may engage in and prohibits disabled vehicle operators from entering the marketplace for towing services. *See, Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 805 (1976) (This Court, discussing the market-participant doctrine, noted that State actions, through prohibition and burdensome regulation, interfere with the natural function of markets.). As the Fifth Circuit recognized, "it is only through its police power to regulate the City is able to classify all accident tows as nonconsensual, thus empowering itself with the authority to direct which towing service will perform the tow." *Stucky*, 260 F.3d at 435.

B. There Is No Conflict Amongst The Circuit Courts Regarding The Definition Of Consent And Nonconsent Towing Which Warrants Review By This Court.

The only circuit court to be presented with and specifically address the issue of the factual definitional distinction between consent and nonconsent towing as applied to towing from the scene of a collision has been the Fifth Circuit.[6] The consent-nonconsent factual distinction of

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[6] The *Mayer, Tocher,* and *Petrey* cases all involved challenges under 49 U.S.C. § 14501(c)(1) to municipal laws requiring tow truck operators and their trucks to be licensed or

collision towing reached by the Fifth Circuit in *Stucky*, is a practicable and logical interpretation of the terms, based upon the court's prior decision in *Cardinal Towing*. While the Fifth Circuit's definition of consent towing in *Stucky* may be more expansive, it does not conflict with the definition offered by its sister circuit courts. The Fifth Circuit merely defined the boundaries of the term at the scene of a collision.

In *Cardinal Towing*, the court, defining a nonconsent tow, stated a "true non-consent" tow occurs when "the owner of the vehicle is unwilling or unable to specify a towing company." *Cardinal Towing*, 180 F.3d at 694. "[N]onconsensual tows do not involve any opportunity for market interaction on the part of the owner of the vehicle." *Id.* at 696. "Because the owner of the vehicle will by necessity be unable to choose a towing company in non-consent situations, the only party that can make the type of merit selection inherent in market transactions is the party ordering the tow." *Id.* at 695. Logically, the Fifth Circuit in *Stucky* reached the conclusion that a consent tow occurs when the owner of the vehicle is willing or able to specify a towing company.[7] By implication,

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registered with the city regardless of the type of towing services performed. While the *Tocher* and *Petrey* courts found that nonconsensual towing services performed for the city were exempted from preemption, pursuant to the municipal-proprietor/market-participant doctrine, the courts did not address towing from the scene of a collision.

[7] The City of San Antonio recognizes the right of a vehicle owner to "consent" to having his vehicle towed when a vehicle on a public street is in need of towing for reasons other than a collision. San Antonio City Code, § 19-391(c): Other motor

because the disabled vehicle operator is present, there is opportunity for market interaction between the vehicle owner and tow truck operator for the contracting of towing services. *Stucky*, 260 F.3d at 436. As the *Cardinal Towing* court noted, City of Bedford's ordinance did not "affect situations in which the owner of a disabled car was available and expressed a preference for a particular company at the scene of the accident." *Cardinal Towing*, 180 F.3d at 689. The underlying principles in both *Stucky* and *Cardinal Towing* is that in a consent towing situation, because of the presence of the vehicle operator, the contractual relationship is between the disabled vehicle operator and the towing service. Conversely, in a nonconsent towing situation, because of the absence of the vehicle operator, the contractual relationship is between the city and the towing service.

Petitioners' contention that the City of Bedford's towing system (*Cardinal Towing*) affected "consent tow" as defined in *Stucky*, because by code, the city prohibits tow truck companies from soliciting at a collision scene, is suspect at best. The *Cardinal Towing* decision offers no indication that there was any preemption challenge to that section of the City of Bedford's City Code. Secondly, unlike the City of San Antonio's single vendor contract system, as stated above, the City of Bedford system allows vehicle operators to express a preference for a

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vehicles on public streets, ways or public property may be removed only with the express consent of the owner or operator, or at the direction of the chief of police, his designated representative, or the parking manager of the public works department and duly authorized representatives.

particular company at the scene of the accident, *i.e.*, enter the marketplace for towing services. *Id.* At best, Bedford's prohibition of solicitation affects the means of providing consensual towing services, not the definition.

The Fifth Circuit's definition of consent towing comports with the Eleventh Circuit's definition in *Mayer*, recognizing that consent tows are contractual. Consent tows "occur when the owner of the vehicle expressly requests towing services to be provided by a specific company and enters into a private contract with the towing company for services." *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 541 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999). While the *Mayer* holding is pre-*Stucky*, the example of a nonconsent tow offered by the Eleventh Circuit, the towing of an abandoned vehicle impounded by the police, is in keeping with the underlying principles of the Fifth Circuit's understanding of the term. *Id.* at 541 n.2.

The Sixth Circuit in *Petrey* simply defined all police-ordered tows as nonconsensual, but offered no specific definition or explanation of the term. *Petrey*, 246 F.3d at 558. However, the court does state that in a consent tow situation, tow truck operators are not doing work for the police department. *Id.* at 559. While in *Tocher*, the Tenth Circuit's definition of nonconsensual towing includes disabled vehicles, along with abandoned and impounded vehicles, the definition was offered in the context of the types of towing the police employ the towing rotation list. *Tocher*, 219 F.3d at 1049. Like in *Petrey*, the *Tocher* court noted that the rotation list solely effects the relationship between the city and towing companies on rotation. *Id.* The *Tocher* decision offers no discussion as to

whether all disabled vehicles are classified as nonconsensual or if only those companies on rotation are permitted to tow disabled vehicles.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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CITY OF SAN ANTONIO and TEXAS TOWING CORPORATION,

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BRENDA L. STUCKY, d/b/a Bill's Wrecker Service, and RICHARD VILLANEVA, d/b/a Creswell's 24 Hour Wrecker Service,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Petitioner, Texas Towing Corporation, is wholly owned by Miller Industries Incorporated, which is publicly traded.

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ARGUMENT

A. The Pendency of Other Cases Before this Court Involving Similar Issues Is Not a Basis for the Denial of Certiorari

Respondents' first proffered reason for denying the petition for writ of certiorari here is that this Court has already granted the petition in *Ours Garage & Wrecker Serv. v. City of Columbus*, 257 F.3d 506 (6th Cir. 2001), *cert. granted*, 122 S. Ct. 802 (2002) (No. 01-419), a case involving a similar analysis of the Federal Aviation Administration Authorization Act's preemptive effect. However, when other cases present similar issues, denial is not this Court's preferred course of action. Instead, this Court either grants more than one of the similar petitions or holds the remaining cases pending decision in the original. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) ("It is an important, recurring issue and is properly raised in another petition for certiorari being held pending disposition of this case"); *Keney v. New York*, 388 U.S. 440 (1967) (court held petition nearly two and a half years until decisions were rendered in other obscenity cases). Petitioners request the same relief here.

Respondents' argument is, in essence, that because the petition failed to arrive at this Court prior to the grant of certiorari in *Ours Garage*, due to circumstances largely beyond Petitioners' control, it should be denied. Ironically, Respondents want this Court to use the importance of the petition's issues, which have been recognized by virtue of the certiorari grant in *Ours Garage*, as a reason to *deny* review. This is the only argument Respondents have offered as a basis for denying certiorari on the issue of a state's ability to delegate its safety authority to municipalities under the Act. Respondents wholly failed to attack either the merits of the City's analysis of that issue or the reasons why this Court should exercise its review power. The petition should be granted or, at the very least, held until decision in the *Ours Garage* case.

B. Respondents Attempt to Artificially Narrow the "Municipal as Proprietor" Point in an Effort to Escape Warranted Review by this Court

1. The Various Conflicts and Importance of This Issue Call for Review

Respondents state in paragraph I of their Brief that, facts aside, the legal issues in this petition and in the *Ours Garage* case are the same, *i.e.*, those concerning the safety exception to the Act. Thus, Respondents urge the similarity of the legal issues as a basis for denying review. However, in the very next paragraph, Respondents lose the forest for the trees and claim that the municipal as proprietor exemption to preemption cannot be divorced from the facts of this particular case. As a result, they request that review be denied despite the singular legal thread running through this and other cases. Respondents also dismiss Petitioners' arguments as nothing more than a request to correct "perceived error." Without question, the "municipal as proprietor" point discusses the facts of this case, just as it points out the errors made by the Fifth Circuit below. But Respondents are wrong when they state that this case does not present issues that go beyond facts and error peculiar to this case.

In fact, Petitioners explained why the Fifth Circuit's analysis, while paying lip service to *Boston Harbor*, conflicted with the very foundation of the market participant exception to preemption. Though directed by this Court's precedent to do so, the Fifth Circuit failed to consider whether the City was acting in its own interest to address a specific proprietary problem, *i.e.*, eliminating the situations that arise from tow truck races to accident scenes that serve to make the City's job of maintaining order on public roads more difficult. The Fifth Circuit, in derogation of *Boston Harbor*, failed to ask whether the City's actions are an effort to regulate or merely the purchase of services required for the accomplishment of its tasks. *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island ("Boston Harbor")*, 507 U.S. 218, 227-33 (1993). Thus, Petitioners demonstrated a

conflict between the opinion below and this Court's precedent. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 687 (1986) (granting certiorari "[b]ecause the reasoning of the Kentucky Supreme Court is directly at odds with language in several of this Court's opinions").

Respondents argue that Petitioners have offered no conflict because they do not contend that *Stucky* directly conflicts with or abrogates *Boston Harbor*. Of course, the Fifth Circuit could not abrogate this Court's precedent; and Petitioners suspect that it is the rare case indeed where a lower court expressly acknowledges its departure from a binding Supreme Court decision. As a result, this Court has accepted jurisdiction when there is an "apparent" conflict between its decisions and those of lower courts. *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) ("We granted certiorari to resolve an apparent conflict with this Court's precedents and to clarify the law of sovereign immunity with respect to the collection of sales taxes on Indian lands"); *Hardin v. Straub*, 490 U.S. 536, 537 (1989) ("Because that holding appeared to conflict with our decision . . . , we granted certiorari").

Not only did Petitioners demonstrate a conflict with case law from this Court, but Petitioners also explained how the Fifth Circuit's *Stucky* opinion conflicted with the treatment by other circuit courts, as well as that by the Fifth Circuit in a prior opinion.[1] *Petrey v. City of Toledo*, 246 F.3d 548, 560-61 (6th Cir. 2001); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1050-51 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001); *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999); *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 544 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999). Again, Respondents fault the petition for not citing cases in "direct conflict with the holding in *Stucky*."

1. *See Scarborough v. United States*, 431 U.S. 563, 567 n.4 (1977) (granting certiorari in the face of a split among the circuits, which was accompanied by an intracircuit conflict).

However, this Court has granted certiorari in the event of an apparent conflict among circuit courts, as well. *International Broth. of Elec. Workers, AFL-CIO v. Hechler*, 481 U.S. 851, 855 (1987) ("Because the Eleventh Circuit's decision appeared to conflict with the decision of the Sixth Circuit . . . , we granted certiorari"); *United States v. National Bank of Commerce*, 472 U.S. 713, 719 (1985) ("Because the opinion of the Court of Appeals appeared to us to conflict, directly or in principle, with decisions of other Courts of Appeals, we granted certiorari").

The conflict here rests on how the circuit courts use the consent/nonconsent dichotomy to determine application of the market participant preemption exception and calls into question whether it should be the determining factor at all.[2] While it is true that the circuits have held that nonconsensual towing is exempted from preemption pursuant to the market participant doctrine, and that consensual towing is not, the circuits do not agree on where to divide that line and, in that way, conflict in their application of the *Boston Harbor* exception. *Stucky*, 260 F.3d at 434 n.11 (rejecting the notion that all tows from the scene of accidents on public ways are properly characterized as nonconsensual); *Petrey*, 246 F.3d at 558 (defining all police-ordered tows as nonconsensual); *Tocher*, 219 F.3d at 1049 (including within definition of "nonconsensual tows" those that concern "abandoned, disabled, stored or impounded vehicles from public or private property"); *Mayer*, 158 F.3d at 541 n.2 (defining nonconsensual towing services as occurring "when law enforcement or other local authorities determine that a vehicle must be towed and the owner of the vehicle is not afforded the opportunity to request towing services from a specific company"). Respondents seek to convince this Court that because the labels applied to the tows are consistent on

2. Petitioners would again point out Respondents' excessive focus on the facts, *i.e.*, that the petition should be denied because the Fifth Circuit's decisions do not conflict with those of other circuits where not all of them involved "towing from the scene of a collision." (*Brief in Opposition at 9*)

their face among the various circuit courts, the differences in the meanings ascribed to those labels should be overlooked.

Moreover, they imply that Petitioners simply want another appellate court to review the facts of this case and rule in the City's favor. However, Petitioners have presented a real conflict between the Fifth Circuit and both this Court's authority and decisions by other circuit courts. While this Court does not typically grant certiorari to review evidence and discuss specific facts, this Court does not reject review of important issues simply because the application of broader legal principles may require reference to that evidence and those facts. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 140 (2000) (granting certiorari to resolve conflict even though court's decision involved detailed discussion of evidentiary record); *Saenz v. Roe*, 526 U.S. 489, 498 (1999) ("we granted certiorari because of the importance of the case"); *Crawford-El v. Britton*, 523 U.S. 574, 584 (1998) (granting certiorari because of the importance of both the underlying issue and a correct understanding of Supreme Court precedent, "[d]espite the relative unimportance of the facts of this particular case"); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995) (granting certiorari to resolve conflict, though particular case dealt with construction of New York statute).

Petitioners are not, contrary to Respondents' representations, asking this Court to resolve a factual dispute. Petitioners agree with Respondents that safety was the primary consideration behind the passage and enforcement of the single vendor system and related ordinances and that the City was attempting to address the issue of wreck chasing. Petitioners and Respondents simply disagree whether the City was acting in a proprietary manner in purchasing services to accomplish the functions entrusted to it, including keeping public roadways safe for all San Antonio travelers. The basis for granting certiorari is further fortified by the *Stucky* court's casual refusal to consider a Texas state statute on the issue, which had been

recently amended to prevent the definitional dichotomy used by the Fifth Circuit. *Stucky v. City of San Antonio*, 266 F.3d 342 (5th Cir. 2001); *see, e.g., C.I.R. v. Asphalt Products Co., Inc.*, 482 U.S. 117, 120 (1987) ("Because this holding is in apparent conflict with [a lower court decision], and is in obvious conflict with the plain language of the statute, we grant certiorari").

The application of the market participant preemption exception is of extreme importance, particularly given the malleable definitions the various circuits have employed in determining its application. Without review by this Court, any federal circuit court, when called upon to determine how far a federal towing statute can go in prohibiting local action, can simply categorize the tow as consensual. Such an approach is an unworkable implementation of federal law. There must be uniformity among the circuits on how the FAAAA applies. It makes no sense that under federal statutory law and federal preemption principles, a federal court in California can allow that which a federal court in Texas prohibits.

2. The *Stucky* Court Erred in its Application of the Market Participant Preemption Exemption

After its feeble justifications for denying review, Respondents turn to the merits of the market participant exemption and argue that the consent/nonconsent dichotomy must be employed because "it defines who the market actors are." But that conclusory assertion begs the question, where Petitioners have attacked the Fifth Circuit's consumer model as an inappropriate way to apply the *Boston Harbor* preemption exemption. Respondents next rationalize the Fifth Circuit's categorization of some tows as consensual and of others as nonconsensual. In doing so, they characterize certain of Petitioners' arguments as "ridiculous," quote extensively from the *Stucky* opinion itself, and give short shrift to the differences among the circuit courts.

What Respondents refuse to do is recognize that the contract at issue in this case extends only to City-authorized tows, *i.e.*,

a narrowly-defined area limited to vehicles that have been abandoned or involved in a collision and not affecting towing from private property. Respondents mock this distinction, stating that the only way consumers could have a choice is if they are involved in a collision on their own private property. This statement is patently inaccurate, and Petitioners never implied such a result. Respondents' extensive quote from *Stucky* also refuses to recognize the limited nature of the City's participation, particularly when the Fifth Circuit only a short time before held that a municipality acts in its own interests when it obtains towing services "to maintain traffic flow in the wake of an accident and remove abandoned vehicles blighting their environment." *Cardinal Towing*, 180 F.3d at 696.

Respondents characterize the *Stucky* court's holding as "logical," though the *Stucky* court itself expressed reservation. *Stucky v. City of San Antonio*, 260 F.3d at 437. The Fifth Circuit previously and every other circuit court to have addressed the issue have given a much broader meaning to nonconsensual tows that are free from the FAAAA's preemptive reach. Respondents fail to recognize the broad nature of the *Cardinal Towing* court's definition of nonconsensual tows, as well as the analytical underpinnings of that decision, and cite out of context section 19-391 of the San Antonio City Code in support of their desired meaning for consensual tows.

In *Cardinal Towing*, the Fifth Circuit actually rejected the consumer model, *i.e.*, looking only to whether the City or vehicle owner is the purchaser of the tow. 180 F.3d at 696. Instead, the Fifth Circuit focused on whether the City was acting in a proprietary capacity regarding the only tows that were at issue in that case, which the Fifth Circuit characterized as nonconsensual. *Id.* at 695-97. However, the definition of nonconsensual tows encompassed what Respondents would characterize as consensual tows, *i.e.*, situations in which the vehicle owner would like to make a choice, but is prohibited

from doing so. *Id.* at 694-96; BEDFORD, TEX., MUN. CODE § 126-156 ("Regardless of [the definition of nonconsent tow], certified law enforcement officials may control the scene of an accident in the manner they deem appropriate"). Moreover, the Fifth Circuit stated the respective cities' purposes behind the challenged ordinances in both *Cardinal Towing* and *Stucky* in nearly identical terms. *Cardinal Towing*, 180 F.3d at 696; *Stucky*, 260 F.3d at 438. While the purpose supported a proprietary intent in *Cardinal Towing*, Respondents would have this Court accept that the same purpose supported a regulatory intent in *Stucky* because the *Stucky* ordinances encompassed a minimal amount of what they term consensual tows.[3]

Respondents also try to minimize the distinctions between *Stucky* and other circuit court decisions in their consent/nonconsent dichotomy. They focus only on the definition of "consensual" tows in *Mayer* and link the definitions in *Petrey* and *Tocher* solely to a rotation list. In spite of those efforts, the distinctions remain. While the *Mayer* court defined consensual tows as when a vehicle owner privately contracts with a towing company, it excluded from the definition situations in which the owner of the vehicle is not afforded the opportunity to request towing services from a specific company. 158 F.3d 541 & n.2. And the broad definitions used by the *Petrey* and *Tocher* courts for nonconsensual tows did not hinge upon the existence of a rotation list. The *Petrey* court, in determining whether the City's towing provisions were an attempt to regulate the towing industry as a whole and thus preempted, decided against preemption because the towing provisions dealt exclusively with police-ordered tows. *Petrey*, 246 F.3d at 558. The *Tocher* court

3. Respondents' discussion of section 19-391(c) is similarly misleading. The quoted portion is not an indication that the City defines consent tows as those where the vehicle owner is available and willing to make a choice and, thus, protect them from City action; instead, the provision when read in context demonstrates that the City was attempting to protect consumers from the tow truck operators themselves.

held that nonconsensual tows included those of "abandoned, disabled, stored or impounded vehicles from public or private property." 219 F.3d at 1049. In both cases, the courts held that the method by which the City contracts, *i.e.*, through a rotational list or a single vendor system as in *Cardinal Towing*, was irrelevant to the preemption determination. *Petrey*, 246 F.3d at 557-58; *Tocher*, 219 F.3d at 1049-50.

CONCLUSION

Given the conflicts present in this case — conflicts between the *Stucky* opinion and this Court's precedent, decisions from other circuit courts, a prior decision of the Fifth Circuit itself, and Texas statutory language — and the importance of the preemption issues involved, this case is appropriate for review. For the foregoing reasons, this Court should grant the petition for writ of certiorari and reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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